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LEASES INVOLVING THE SECRETARY OF THE INTERIOR AND THE NORTHERN CHEYENNE INDIAN RESERVATION

HEARING

BEFORE THE

SELECT COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 2126

RELATING TO CERTAIN LEASES INVOLVING THE SECRETARY OF THE INTERIOR AND THE NORTHERN CHEYENNE INDIAN RESERVATION

MARCH 28, 1980

BILLINGS, MONT.

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CONTENTS

	Page
S. 2126	3

WITNESSES

Chestnut, Steven, attorney for the Northern Cheyenne Tribal Council	32
Dahlstrom, Clint, vice president and general manager, Chevron Resources Co	19
Ferrand, Chris, director of corporate planning, Peabody Coal Co., Billings, Mont	13
Harrison, David, Acting Director, Office of Trust Responsibility, Bureau of Indian Affairs	7
Haughey, Jim, attorney representing Peabody Coal Co	13
Portmann, A. Frank, director, Federal Affairs, AMAX Coal Co	17
Prepared statement	17
Reger, Jim, vice president, NGR Co	20
Richardson, Doug, Council of Energy Resource Tribes	32
Rowland, Allen, president, Northern Cheyenne Tribal Council	32
Wooten, Ron, Consolidation Coal Co	21
Prepared statement	21

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LEASES INVOLVING THE SECRETARY OF THE INTERIOR AND THE NORTHERN CHEYENNE INDIAN RESERVATION

MARCH 28, 1980

U.S. SENATE,
SELECT COMMITTEE ON INDIAN AFFAIRS,
Billings, Mont.

The committee met, pursuant to notice, at 10:30 a.m., in the city council chambers, Billings, Mont., Hon. John Melcher presiding.

Present: Senator Melcher.

Staff present: Max Richtman, staff director, Virginia Boylan, staff attorney, and Joe Meglen, special counsel.

Senator MELCHER. The committee will come to order, please.

Good morning. This is a public hearing on S. 2126 for the Select Committee on Indian Affairs of the Senate.

This bill was to cancel certain coal leases and permits on the Northern Cheyenne Reservation and to allow for payment of damages by the Secretary of the Interior to the coal companies that hold those permits and leases. We hope to learn today what damages may be due to the coal companies involved.

A total of 56 percent of the Northern Cheyenne Reservation land area is affected by the permits and leases that were entered into between 1966 and 1973. In 1974, in response to a petition of the Northern Cheyenne Tribe, the Secretary of the Interior suspended all activity, and the situation has remained at an impasse since then. That was 6 years ago when the tribe petitioned. I think the Secretary was Rogers Morton.

The Secretary at that point said, "Nothing is going to happen," and nothing has happened since that time. This bill which I have introduced is to do what the Secretary could have done, I believe, and probably should have done, 6 years ago. That is to cancel the coal leases and the permits on the basis that they were entered into in a manner that violated the Federal Government's trust responsibility to the tribe.

To dramatize that, I believe the royalties provided in the leases are 17 cents per ton. If that is an error, we will find out from the coal companies, but I don't think there is any of us that can believe that a royalty for the owner of the coal at 17 cents a ton is adequate. We can talk about what was legal and what was done in those particular years, but I just do not believe that that type of royalty is adequate at all, and I think there really is a very valid point—in my judgment at least there is a valid point—on whether the trust responsibility of the Secretary was properly carried out regarding that point.

Also, it seems apparent that there were leases in excess of the acres allowed under law, and we will listen to the testimony we receive today on that particular point.

Now, without legislation to cancel the leases, the tribe's only alternative is to resort to the courts, and it would result in, of course, very lengthy and costly litigation, and while that litigation is going on, it would cloud the title to a major portion of the reservation for many, many years to come.

So until something happens, all these matters are in limbo, and last December, I introduced S. 2126 in an effort to settle the matter for all the parties involved.

At this point, I will place a copy of S. 2126 in the record.

[The bill follows:]

96TH CONGRESS
1ST SESSION

S. 2126

Relating to certain leases involving the Secretary of the Interior and the Northern Cheyenne Indian Reservation.

IN THE SENATE OF THE UNITED STATES

DECEMBER 13 (legislative day, NOVEMBER 29), 1979

Mr. MELCHER introduced the following bill; which was read twice and referred to the Select Committee on Indian Affairs

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A BILL

Relating to certain leases involving the Secretary of the Interior and the Northern Cheyenne Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that—

(1) certain mineral leases and prospecting permits entered into between the Northern Cheyenne Tribal Council and private parties in 1969, 1970, and 1971 presently encumber approximately 53 per centum of the lands within the boundaries of the Northern Cheyenne Indian Reservation;

(2) due to the likelihood of permanent and large-scale disruption of their tribal community which would result from development under such leases and permits, the Northern Cheyenne Indian Tribe has been and continues to oppose any development under these leases and prospecting permits;

(3) although such leases and permits were approved by representatives of the Secretary of the Interior, it is a serious question as to whether such approval is consistent with the trust responsibility of the Secretary of the Interior to "act in the best interests" of Indian tribes and individuals;

(4) the present impasse which has existed with regard to such leases and permits, unless resolved, can only result in expensive and time-consuming litigation which does not hold out the likelihood of a satisfactory solution which would be fair to all parties; and

(5) cancellation of such leases and permits, and providing a fair remedy to any party or parties whose property interest, invested in good faith, would be adversely affected by such cancellation, appears to be the most direct and effective manner within which to resolve this impasse.

SEC. 2. Effective on the date of the enactment of this Act, all coal leases and permits issued pursuant to the provi-

sions of the Act of May 11, 1938 (25 U.S.C. 396a), and involving the Northern Cheyenne Indian Reservation, are canceled:

Name of companies	Document numbers	Dates of entry
Peabody Coal Company (lessee)	14-20-0257-897	November 17, 1970
	14-20-0257-899	November 17, 1970
	14-20-0257-900	November 17, 1970
	14-20-0257-901	November 17, 1970
	14-20-0257-902	November 17, 1970
	14-20-0257-903	November 17, 1970
Peabody Coal Company (permit)	C-57-P-30	August 18, 1969
	C-57-P-31	August 18, 1969
	C-57-P-32	August 18, 1969
Bruce L. Ennis (now assigned to Chevron Oil).	C-57-P-42	May 21, 1971
	C-57-P-45	June 14, 1971
Norsworthy and Reyer, Incorporated	C-57-P-46	June 14, 1971
	C-57-P-47	June 14, 1971
Consolidation Coal Company	C-57-P-43	May 21, 1971
Meadowlark Farms, Incorporated (subsidiary of AMAX).	C-57-P-40	May 21, 1971
	C-57-P-41	May 21, 1971
	C-57-P-44	May 21, 1971

SEC. 3. The Secretary of the Interior is authorized to receive, consider, and pay claims for damages arising out of the cancellation of leases and permits pursuant to the first section of this Act. Such claims shall be submitted in such manner, at such time, and contain such information as the Secretary of the Interior shall, by regulation, prescribe.

SEC. 4. (a) The Secretary of the Interior shall file an annual report with the Congress with respect to claims submitted pursuant to this Act. Such report shall include the name of each claimant, the nature of the claim, the amount, if any, paid pursuant to such claim, and information with respect to the disposition of such claim.

63-275 O - 80 - 2

(b) No claim shall be received by the Secretary of the Interior pursuant to this Act unless such claim is submitted to the Secretary of the Interior during the twelve-month period following the date of the enactment of this Act.

SEC. 5. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Senator MELCHER. Our first witness this morning is David Harrison, acting director of the Office of Trust Responsibility at the Bureau of Indian Affairs. David, we will be glad to have your testimony at this time, and it looks like the best witness seats are right there.

STATEMENT OF DAVID HARRISON, ACTING DIRECTOR, OFFICE OF TRUST RESPONSIBILITY, BUREAU OF INDIAN AFFAIRS

Mr. HARRISON. Good morning.

Mr. Chairman and members of the committee, I am pleased to have this opportunity to present the views of the Department of the Interior on S. 2126, a bill relating to certain leases involving the Secretary of the Interior and the Northern Cheyenne Indian Reservation.

S. 2126 would cancel certain coal leases and permits on the Northern Cheyenne Indian Reservation and would provide for the Secretary to receive, consider, and pay all claims arising out of the cancellation of the leases and permits.

In the late 1960's and early 1970's, a Bureau of Indian Affairs official, acting under delegated authority, approved these leases and permits between several coal mining companies and the Northern Cheyenne Indian Tribe. Since that time, as we have outlined in our report, changed circumstances and changed desires of the parties involved have resulted in a failure to carry out the terms of the leases. The result has been a continuing stalemate with the specter of litigation overshadowing each new attempt to resolve the situation.

We do not believe the cancellation and the Federal buy-out approach of S. 2126 offers a fair solution to this impasse. As stated in our report to the committee, we believe this measure is both unjustified and unnecessary and would set a bad precedent for future similar situations that may arise.

We still feel strongly, Mr. Chairman, that this impasse can be resolved by good faith negotiation on the part of all the parties concerned and that this approach is preferable to the approach laid out by S. 2126, and, consequently, we strongly oppose S. 2126 and suggest instead that additional efforts be made toward the amicable settlement of the dispute.

This concludes my prepared statement, Mr. Chairman. I will be pleased to answer any questions you may have or to discuss the general outlines of the approach that we prefer.

Senator MELCHER. Thank you, David.

We will enter into the record, at this point, the letter from the Department of the Interior, dated March 27 of this year, signed by Sidney L. Mills, Deputy Assistant Secretary.

[The letter follows:]

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 27, 1980.

HON. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for our views on S. 2126, a bill "Relating to certain leases involving the Secretary of the Interior and the Northern Cheyenne Indian Reservation." We oppose the enactment of S. 2126.

S. 2126 would cancel all coal leases and permits issued under the Act of May 11,

1938 (25 U.S.C. 369a) and involving the Northern Cheyenne Indian Reservation, and would authorize the Secretary of the Interior to receive, consider, and pay claims for damages arising out of such cancellation.

In 1969, 1970, and 1971, a Bureau of Indian Affairs official, acting under delegated authority, approved a number of mineral leases and prospecting permits entered into between the Northern Cheyenne Tribe and certain private parties and encumbering approximately 53 percent of the lands within the boundaries of the Northern Cheyenne Indian Reservation. All of the leases involved were entered into with the Peabody Coal Company. The other companies involved were issued prospecting permits. During the early 1970's, however, the tribe, upon reconsideration of the development contemplated by the leases and permits, concluded that the financial benefits of development were outweighed by the social effects of a "boom town" atmosphere and the environmental effects of extensive stripmining.

On June 4, 1974, in response to a petition submitted by the tribe, the Secretary decided that no lease for development of coal on the reservation would be approved if it exceeded an acreage limitation of 2,560 acres, set by regulation in 25 C.F.R. 171.9, unless a specific, formal finding is made that such acreage is needed for electric generating or other industrial facilities. The Secretary's decision also stated that no action would be taken by the Department toward development of the coal without strict compliance with the National Environmental Policy Act (42 U.S.C. 4321 et seq.) or without the endorsement of the tribe.

Other factors, including inaction on the part of the companies involved, have also delayed the development of the Northern Cheyenne coal. There was uncertainty over the constitutionality of certain legislation extending the reservation of the mineral estate in the tribe in perpetuity, which was resolved in favor of tribal ownership in *Northern Cheyenne Tribe* v. *Northern Cheyenne Defendant Class of Allottees, Heirs and Devisees*, 425 U.S. 649 (1976). Further uncertainty, with respect to the standards to which the companies would have to adhere in mining the coal, was resolved in 1977 with the enactment of the Surface Mining Control and Reclamation Act (30 U.S.C. 1701 et seq.).

We believe that legislative cancellation of the leases and permits, along with the payment of damages to the companies out of Federal funds, as contemplated by S. 2126, is both unjustified and unnecessary. Such an approach would place the full burden of the resolution of the dispute on the Federal Government in a situation in which it is clear that other parties, by action or inaction, contributed to the development of the dispute. A total Federal buyout, as provided by S. 2126, is unjustified in such a situation. In addition, rather than providing a final solution to the dispute, we believe that S. 2126 may simply subject the United States to perhaps protracted litigation with respect to the leases by providing a basis, which we believe they do not now have, on which the companies involved may claim that the cancellation of the leases and permits amounts to a taking of property for which just compensation is owed under the Constitution.

Moreover, the precedent S. 2126 would set would affect not only similar situations involving Indian lands, but also the Department's other mineral leasing activities. A cloud could be cast over the stability of the Department's entire leasing program if the Congress abrogates the leases and permits in this dispute.

We also believe that it is inappropriate to authorize the Secretary of the Interior to receive, consider, and pay claims for damages, as is provided in section 3 of S. 2126. The Secretary is not equipped to provide an adequate forum for the consideration of claims including the award of money damages that would ordinarily be heard by a court of law, such as the Court of Claims. The bill provides no standards for the consideration of the claims and leaves unresolved questions with respect to the waiver of sovereign immunity and the allocation of subject matter jurisdiction. Nor does the bill contain any provision making payment of a claim by the Secretary an exclusive remedy and an extinguishment of all claims arising out of cancellation of the lease or permit involved.

In light of the foregoing, we strongly oppose the enactment of S. 2126. We suggest instead that further efforts be made toward the amicable settlement of the dispute.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

SIDNEY L. MILLS,
Deputy Assistant Secretary.

Senator MELCHER. Are you familiar with this letter?

Mr. HARRISON. I am, sir.

Senator MELCHER. First of all, how many leases were let that exceeded 2,560 acres?

Mr. HARRISON. There are six leases outstanding, and I believe only one exceeds the acreage limitation.

Senator MELCHER. For how many acres is that?

Mr. HARRISON. That lease is for 13,000 acres.

Senator MELCHER. So it exceeds it by what, five times?

Mr. HARRISON. By five times; that is right.

Senator MELCHER. How many of the permits exceed 2,560 acres?

Mr. HARRISON. Virtually all of the outstanding permits which contain exclusive options to lease do exceed the acreage limitation.

Senator MELCHER. All of them do?

Mr. HARRISON. Yes.

Senator MELCHER. How many of them are there?

Mr. HARRISON. There are, I think, eight outstanding.

Senator MELCHER. What is the acreage involved?

Mr. HARRISON. Those permits cover acreages ranging from 14,000 to 28,000 acres.

Senator MELCHER. Did the Solicitor write an opinion for the Secretary in 1974 advising the Secretary that this exceeded—this letter says it exceeds the regulations. Does it not exceed the law?

Mr. HARRISON. It is our view that the Secretary of the Department of the Interior is constrained by law to abide by their own regulations.

Senator MELCHER. Does it not exceed the law? Is it not explicit in the law?

Mr. HARRISON. The acreage limitation is a matter of regulation.

Senator MELCHER. What does the FLPMA Act of 1976 contain in acreage restriction?

Mr. HARRISON. I am not familiar with the acreage in the FLPMA legislation.

Senator MELCHER. What about the Federal leasing law that was passed in 1976? Is that not explicit?

Mr. HARRISON. I am not familiar with the terms of the Federal leasing act. I am aware of the vast excess of the acreage limitation that is covered by the permits that are outstanding, and the Solicitor's office has reviewed those. That was reviewed by the Solicitor's office at several levels within the Department.

Senator MELCHER. Well, just so we are not trying to indicate that somehow the regulations are to intercede and protect where the law does not cover, or there is some vagueness in the law that is only picked up by the regulations, can we agree that—whatever you want to call the regulations in 25 CFR section 171.9—that these are illegal leases in terms of acreage?

Mr. HARRISON. We can agree that these documents violate the terms of that regulation. Now, this is a question that has been in the minds of the Government's attorneys throughout this dispute as to whether or not the appropriate remedy for that violation is an outright cancellation.

Senator MELCHER. No. We will get to that a little bit later, David. I just wonder what we can agree on.

Mr. HARRISON. Yes, sir. We can agree that these permits——

Senator MELCHER. Are illegal?

Mr. HARRISON [continuing]. Exceed the limitation.

Senator MELCHER. Are they illegal? Can we agree on that in regard to acres?

Mr. HARRISON. Mr. Chairman, the Government's attorneys have thus far declined to advise the Secretary that these documents are, in fact, illegal.

Senator MELCHER. Even on acreage? You won't even concede that?

Mr. HARRISON. But I am prepared to admit and concede to this committee that the regulations that the Secretary has imposed upon himself are binding as a matter of law. These permits exceed that number.

Senator MELCHER. I think that is a back door way of saying it. It satisfies me for the time being.

It is well and good to say, "Well, we don't think we need any legislation because we can reach an amicable settlement by negotiation." The record does not show that, David. Six years have gone by, and there has been no negotiation that has been meaningful, and there has been no settlement at all.

Mr. HARRISON. Let me respond to that in two ways, Mr. Chairman.

In the first place, this matter has been vigorously pursued by the tribes with the involvement of the Department of the Interior and the companies involved for some 2 years now. There has been a great deal of activity toward coming to a resolution of the impasse that is acceptable to all the parties, and we believe that we can provide such a resolution.

I do not intend to say, or leave the impression, that legislation is not necessary. It is simply the approach to the resolution contemplated by S. 2126 which we find objectionable.

Senator MELCHER. Yes; but you know as well as I do, that when you present testimony like this—do not present an amendment, do not have a bill of your own—that you're leaving it entirely, and you can drift from one Congress to another, one 2-year period to another.

Mr. HARRISON. I am hopeful, Mr. Chairman, that the testimony this committee receives from the witnesses that will appear here this morning will provide you with a good deal more encouragement as to the progress that has been made than my statements alone.

Senator MELCHER. Well, we are very careful, and the Department is very careful, David, not to even suggest it. As you well know, I well know, once you start into this business of swapping the coal involved in this lease on an Indian reservation for Federal coal off the reservation, you're talking about huge values. It is apparent that the Department has chosen to speak rather vaguely about negotiations, without seemingly knowing anything about negotiations and without saying anything about negotiations, that it does involve rather heavy amounts of coal in terms of dollars in value.

Mr. HARRISON. Let me assure the committee that the Department is not contemplating any kind of a swap that would involve even a remote parallel, either in acreage or in the tonnage covered by these permits. I would like to add, Mr. Chairman, I believe the approach that we prefer would result in a resolution of the issue that would cost the taxpayers of the American public far less dollars and/or coal than would be involved in the approach contemplated by S. 2126.

Senator MELCHER. Well, we will ask you what you think that value is in a moment, but first of all, I want to cover the point that concerns the amount of royalty available in the leases. Is 17 cents the figure?

Mr. HARRISON. The first coal sale involved a royalty of 15 cents per ton for coal consumed on the reservation and 17½ cents a ton for other coal. The subsequent leases, I believe, provided for a royalty of 17½ cents per ton for coal consumed on the reservation and 20 cents per ton for other coal. So your numbers are correct.

Senator MELCHER. What was paid in the form of bonuses?

Mr. HARRISON. I will have to supply an exact figure for the record, but my understanding is that approximately $2.5 million has been paid over to and has been received by the Northern Cheyenne Tribe at this time. There are additional moneys in the form of annual rentals that are being held in escrow.

Senator MELCHER. Do you know how much is there?

Mr. HARRISON. Again, I will have to supply the exact figure, Mr. Chairman. It is in the neighborhood of, I think, some $2 million.

Senator MELCHER. Does it draw interest?

Mr. HARRISON. It does draw interest.

Senator MELCHER. What interest rate does it draw?

Mr. HARRISON. I don't know at what rate.

Senator MELCHER. Treasury rate?

Mr. HARRISON. No, sir. We are exceeding Treasury rates. I don't know at what interest rate that money is presently invested. We are averaging about 15 percent on our investments now.

Senator MELCHER. Now, is that held in escrow in a certain fund?

Mr. HARRISON. Yes, sir.

Senator MELCHER. Was the $2.5 million bonus distributed to the tribe?

Mr. HARRISON. Yes, sir.

Senator MELCHER. In its entirety?

Mr. HARRISON. That $2.5 million represents the sum—the approximate figure that has been paid over to the tribe in its entirety—that has been received by the tribe. Since the dispute arose, the tribe has declined to accept the rental and other payments that have been made.

Senator MELCHER. But the purpose, the point of my question is, Is the amount that is held in escrow, based on rentals, the total unexpended amount that arose from these leases and permits?

Mr. HARRISON. I believe it is.

Senator MELCHER. What we are really talking about, then, the outside damages, are what, $2.5 million plus the $2 million in escrow?

Mr. HARRISON. That depends, Mr. Chairman. The way the bill is written, there are no guidelines provided for determining those damages. I am quite confident that these companies, if thrown into the situation contemplated by S. 2126, would submit claims not only to recover their actual expenses to date, but for the value of that money for the last 10 years, and probably the lost profits on the hundreds of millions of tons of coal which have been taken from them. They would probably raise the question, if the Secretary didn't agree with them, in ensuing litigation, that they have property rights in these leases and permits which have been taken and for which just compensation is due.

Senator MELCHER. I am really entranced with this idea of a property right in something as vague as a coal permit or a coal lease. I won't deal with it on the Indian reservation. I just deal with it on the Federal coal. It is my understanding that if I had a lease on Federal coal, regardless of how I acquired it, I would have to get an approved mining plan. I would have to do all sorts of things, and that may or may not ever happen. What is my right?

Mr. HARRISON. Your leasehold interest?

Senator MELCHER. What is my right in that instance, when the mining plan is turned down?

Mr. HARRISON. Your right is to keep coming until you get one, but you do have a right.

Senator MELCHER. Under our law, there are some places that have been leased that will never be mined, and what is my right where the law prohibits the mining in that instance?

Mr. HARRISON. I am not sure I fully understand that question.

Senator MELCHER. Well, we are talking about coal leases for Federal coal that go back into the late 1960's or 1970's, maybe even some older than that. Since that time, we passed the Federal Strip Mining Act that outlines areas that will never be mined.

Mr. HARRISON. That is right.

Senator MELCHER. So, what is my right?

Mr. HARRISON. Your right is probably to receive compensation for something that was taken from you. I might add that the President has directed the Secretary to examine all of those Federal leases and to take whatever steps are necessary to deal with those that are not producing and are not environmentally acceptable, including the submission of legislation to authorize payment of compensation for those.

Senator MELCHER. Now, wait a minute. When the Secretary gets around to introducing that legislation, I would like to be around. I hope I can survive in Congress to see what type of legislation that is.

Mr. HARRISON. And let me answer, too, Mr. Chairman, that the average size of a Federal coal lease is in the neighborhood of—at least as of a couple of years ago—in the vicinity of 1,400 acres as opposed to the tens of thousands of acres involved here.

Senator MELCHER. Yes, that is right.

Let's review two things. It is highly unlikely that any court would find that a property right existed, however vague it is, and I think these property rights that are claimed on coal leases and Federal coal permits are really vague. But however vague it is, or however firm it is, it is hardly likely that anybody, the Secretary, the Secretary solicitors, or any Federal court would feel that any property right flowed from an illegal lease or an illegal permit. Is that not true?

Mr. HARRISON. Some courts have come down precisely that way involving both Federal and Indian leases. Some courts have looked at those very same questions, Mr. Chairman, and declined to rule that no rights have vested. Some courts have undertaken some rather imaginative arithmetic to try to resolve themselves the kinds of disputes that we have here, and which we think are best worked out by the parties themselves.

Senator MELCHER. Since 1974, you have had the opportunity to work that out between the parties themselves. You said, "Well, during the past 2 years, we got busy on it." Isn't it apparent that from 1974, whatever damages might be claimed will have to be damages against the Secretary and the Federal Government?

Mr. HARRISON. If the Congress cancels these leases, that is true. If the Secretary attempts to cancel these leases, I am sure the companies would challenge that, and then we would have to wait for the results of that litigation to determine where the claims for damages would lie.

Senator MELCHER. OK. Let's conclude on this point, then. The sum and substance of your testimony is that whatever is done is probably going to need legislation; is that right?

Mr. HARRISON. That is correct, Mr. Chairman. Let me add that the Department greatly appreciates the interest that this committee has shown in addressing this longstanding dispute, and we are anxious to work with the committee in a way to get us over this hurdle and in a way that we believe involves all of the parties and involves a little give and take on the part of all of the parties.

Senator MELCHER. Thank you very much, David.

Mr. HARRISON. Thank you, Mr. Chairman.

Senator MELCHER. Now, we will have the coal companies' representatives. Would you all gather here, please.

Please start here and identify the panel.

Mr. WOOTEN. Mr. Chairman, my name is Ron Wooten, and I am with Consolidation Coal Co.

Mr. HAUGHEY. I am Jim Haughey, an attorney in Billings, Mont., representing Peabody Coal Co.

Mr. FERRAND. Mr. Chairman, my name is Chris Ferrand, director of corporate planning with Peabody Coal Co.

Mr. PORTMANN. Mr. Chairman, my name is Frank Portmann, and I am director of Federal affairs for AMAX Coal Co.

Mr. DAHLSTROM. Mr. Chairman, my name is Clint Dahlstrom, and I am the vice president and general manager of Chevron Resources Co.

Senator MELCHER. Is Jim Reger here yet?

Mr. REGER. Yes, sir.

Senator MELCHER. Jim, do you want to be part of this group?

Mr. REGER. Yes, thank you, sir.

Senator MELCHER. We have you on the list.

Mr. REGER. OK.

Senator MELCHER. Now, the testimony we have is the testimony you have prepared, Mr. Haughey?

Mr. HAUGHEY. Yes, Mr. Chairman.

Senator MELCHER. Are you speaking for the group?

Mr. HAUGHEY. No. I am speaking, Mr. Chairman, for Peabody Coal Co., and it may well be that some, and perhaps all of the other companies may make brief statements, but I plan to make a principal—present the principal testimony on behalf of Peabody.

Senator MELCHER. OK. Would you proceed.

STATEMENT OF JIM HAUGHEY, ATTORNEY, ACCOMPANIED BY CHRIS FERRAND, DIRECTOR OF CORPORATE PLANNING, PEABODY COAL CO., BILLINGS, MONT.

Mr. HAUGHEY. Mr. Chairman, Peabody is the holder of six coal leases and three prospecting permits within the boundaries of the reservation. S. 2126, the bill which is the subject of these hearings, would cancel these and all other coal leases on the reservation and

63-275 O - 80 - 3

would provide for payment of damages to the permittees and lessees for such cancellation.

Over a period of nearly 14 years, Peabody has invested literally millions of dollars in the purchase, maintenance, and exploration of these properties, and accordingly, Peabody has a great deal at stake in the outcome of the legislation which you have proposed.

We wish to convey, Mr. Chairman, our gratitude to you for your efforts to find a solution to this problem of development of the Northern Cheyenne coal. Peabody shares a genuine interest in resolving this continuing impasse, that the impasse between the interest of developing valuable coal resources on the one hand, and the desire of the tribe on the other to prevent mining activities which the tribe conceives would be inconsistent with their culture and their traditions.

I want to emphasize that while the tribe consulted us before requesting this legislation, Peabody had no hand in the preparation of the request, nor did we take any steps to initiate the effort. While we consider the coal properties to be extremely valuable from the standpoint of quality, quantity, and resource configuration, we have recognized for some time that the tribe is genuinely reluctant to have the leases developed.

What I want to point out, Mr. Chairman, is that these leases, these permits under some of which the Peabody leases were selected; were purchased at the invitation of the tribe and/or the Federal Government in good faith at open competitive bidding at public sale for terms established by the Department of the Interior; were executed by the tribal authorities; and were approved by the Secretary of the Interior. Peabody firmly believes that its permits and leases are valid and subsisting, and that if they are now unacceptable to the tribe, the fault, if there is any, is that of the Department of the Interior acting on behalf of the Northern Cheyenne Tribe for the United States.

Now, with respect to the permits, my conception is, as I recall the law—and I have not recently reviewed it, I must say—that the acreage limitation of 2,560 acres, at the time these permits were sold, was not applicable to the permit. It was applicable to leases selected under the permits after exploration was done on the wider area covered by the permits, but it itself was subject to modification and expansion if the company, vying for the leases, were to show a need for the larger acreage for certain stated purposes. My understanding is that Peabody did make that showing. I don't know to what extent it was in writing.

At any rate, we conceive that the permits were valid and that the leases that are held by Peabody are valid. We conceive that Peabody has valid property rights which are enforceable by a court which has jurisdiction over the parties and the subject matter, and that if the case gets to the courts, those rights will be upheld. And so we do not recognize, nor admit, nor concede, that these are not property rights and that they are not enforceable in a proper court. I suppose that this isn't the place, though, to get into a legal argument about the validity, but I think it should not be assumed that these are not valid leases and permits.

On June 4, 1974, the Secretary of the Interior issued a decision on the petition of the tribe which sought cancellation of these permits and leases for the failure—alleged failure—of the Department to properly exercise its trust responsibility for the tribe. The decision did not rule upon the validity of the leases and permits but, instead, left them in

limbo in an uncertain status which clouds the title to the tribal lands and yet prevents the development of the tribe's coal.

Peabody, at one time, had the firm intention to develop these properties, and it entered into a contract with Cities Service Co. and Northern Natural Gas to utilize the coal in a proposed gasification facility. Substantial amounts of money were exchanged. Drilling was undertaken in the furtherance of that effort, but by the action of the Secretary, a cloud was placed on the validity of the leases and the coal supply agreement consequently had to be terminated. Peabody recognizes that in view of the opposition of the tribe and the decision of the Secretary, it presently is not possible to develop these properties, but we are hopeful that since S. 2126 has been introduced that an equitable solution to this impasse can be found; one that is acceptable to the tribe and to the companies and the Federal Government.

Our aim, which, I believe, is shared by all parties, is to avoid costly and time-consuming litigation. We believe that the likelihood of such litigation would be significantly diminished, if not wholly eliminated by an amendment to S. 2126 which would permit the Secretary to pay cancellation damages in the form of alternative coal rights or in rights to bid in future competitive coal lease sales. Under such an amendment, the alternative coal rights, or in lieu of that, certain bidding rights, would be conveyed in accordance with signed agreements with the Secretary of the Interior.

I want to assure you that we're not talking about an exchange of coal leases per se, a quid pro quo, a ton-for-ton exchange, in any way. We do not seek alternative coal rights measured by the estimated reserves held under the leases or permits on the reservation. Rather, we believe that we can reach an equitable agreement with the Secretary in which leases of a specified quantity of coal or amount of coal would be accepted in full payment for any claims arising out of the cancellation of our leases and permits. And these reserves that we would seek in such an agreement would not of themselves constitute new mining units, but would really constitute adjunct reserves to existing Peabody properties outside the reservation.

We have had preliminary discussions with the Department of the Interior, and we are convinced that a satisfactory agreement, such as we outlined, can be reached. In fact, in our discussions, Department personnel have indicated that they favor such an approach, and I believe the discussion this morning with Mr. Harrison indicates that approach is one that is viable.

By confirming in statute the efficacy of the agreements freely entered into by the Secretary and the affected companies, the legislation would avoid the obvious constitutional problem of unilateral congressional cancellation of leases and permits. Further, it would eliminate the uncertainty in the future leasing, not only of Indian coal, but of federally owned coal which is created by the prospect of congressional action to extinguish property rights purchased at public competitive bidding permit sales.

Therefore, Mr. Chairman, we urge your consideration of an amendment which would permit the Secretary to enter into agreements under which coal leases or coal rights could be leased as compen-

sation to the existing lease and permit holders. These rights or leases, once selected, would be subjected to normal land use planning and environmental review under the Interior Department's Federal coal management program. If all or part of the agreed upon properties were found to be unsuitable for mining or for leasing, bidding rights could be substituted in accordance with a formula specified in the agreement. These bidding rights would be usable in future competitive coal lease sales.

We would be happy to work with you and your staff in developing an appropriate agreement. We think that perhaps the Department is better equipped to assist in the drafting of appropriate language, but if the committee should please, we will be happy to furnish suggested amendatory language before the close of the hearing.

Mr. Chairman, what we are discussing is not a major alteration of S. 2126 as introduced. We are suggesting that the language of section 3 of the bill be broadened to permit the Secretary to pay claims in coal rights in accordance with agreements between the parties. It might be appropriate to have such agreements reviewed by Congress, and by this select committee specifically, before they should become effective so as to give control in Congress and your committee over the magnitude of any rights which might be thought to be subject to the exchange.

Now, while at first blush it might seem that the leasing of federally owned coal to compensate for cancellation of Indian coal leases is inequitable to the Federal Government, it should be remembered that these leases and permits were issued by the tribe with approval of, and under procedures established, by the Federal Government. Lessees and permittess assumed that the Federal Government, acting as trustee for the tribe, was obligated to see that the rights once granted were not violated, and yet it is now the Federal Government itself which proposes to extinguish those very rights.

In his decision dated June 4, 1974, the Secretary stated in the most direct terms that Peabody and the other affected companies will not be permitted to develop their leases and permits without the agreement of the tribe. We believe that the departmental decision was an administrative taking, an act which, if left uncompensated, for the most extent, would leave the permittees and lessees no alternative but to seek redress through litigation. However, the legislation that you have proposed is an admirable attempt to find an equitable solution. Now, with the cooperation of the tribe—with the cooperation of the Department and having consulted with the tribe, we seek a refinement which is equitable to all parties and which would remove the prospect of litigation.

I want to restate our gratitude for your efforts, Mr. Chairman, and say that we stand ready to assist in any way we can. Mr. Ferrand and I will attempt to answer any questions you may have. Thank you, Mr. Chairman.

Senator MELCHER. Thank you, Jim.

Who else will want to comment here? You are Mr. Portmann?

Mr. PORTMANN. Yes, sir.

Senator MELCHER. From AMAX?

STATEMENT OF A. FRANK PORTMANN, DIRECTOR, FEDERAL AFFAIRS, AMAX COAL CO.

Mr. PORTMANN. Yes, sir. I would like to submit a copy of our testimony for the record and make a couple of very brief statements as far as we are particularly concerned.

We are the holder of three permits within the boundaries of the Northern Cheyenne Reservation at the present time. The bill, S. 2126, would, of course—as everyone else here is aware—dramatically affect us, and we are legitimately concerned about its provisions. We also are genuinely concerned about the Northern Cheyenne's desire to remove any clouds to titles in their lands.

AMAX Coal Co. permits in the Cheyenne area represent the greatest contiguous tonnage reserve that is now controlled by our company, and we and other lease and permit holders relied in good faith on the premise that the Federal Government acted as trustee for the tribe and that they would uphold the rights basically as conveyed.

Our company has been involved with the Northern Cheyenne, the coal reserves in question, and the Federal Government since before 1969. We believe that all of our efforts concerning these coal reserves over the last 11 years have been aboveboard and in good faith.

In 1971, we purchased preferential right prospecting permits within the reservation area, and although there were questions about the marketability of the coal at that time and the value of most of the Federal coal nationally was very minimum at that time, that AMAX decided to proceed in hopes of developing the property. Since then, it has been determined that the value of coal in the area in question is some of the highest in the entire region, and it is our understanding that significant mining operations are planned near the reservation, including rail transportation, which makes the properties which we are discussing even more attractive.

Since the time when the agreement was obtained, the situation has obviously changed dramatically, and now we are caught up in the whole dispute, as is everyone here. We believe that, as was mentioned by Peabody Coal Co. that the introduction of this bill provides all parties with a vehicle to resolve the situation, and I will say that we subscribe to the points brought out in Jim's testimony on what would be needed to come to an equitable solution to which all parties would agree.

We have been in the business for a long time. I have seen many such situations come and go. This is one of the first times that I have seen most of the parties in question in a situation like this, where they agree basically on what is an all-around fair and just remedy, and I commend all of the parties to that, and I hope that we will be able to amend the bill so it will reflect those thoughts.

Senator MELCHER. Thank you, Mr. Portmann. Your prepared statement will be made a part of the record at this point.

[The prepared statement follows:]

PREPARED STATEMENT OF A. FRANK PORTMANN, DIRECTOR, FEDERAL AFFAIRS, AMAX COAL CO.

Mr. Chairman, my name is A. Frank Portmann. I am Director of Federal Affairs for AMAX Coal Company.

AMAX Coal Company is presently the holder of three permits which are within the boundaries of the Northern Cheyenne Indian Reservation. All of these permits/leases are directly affected by S. 2126, which seeks to void all AMAX (and other parties') coal rights on the Reservation and provide payment of damages to holders of the affected permits and leases.

Mr. Chairman, S. 2126 could have a significant effect upon AMAX Coal, and we are legitimately concerned about its provisions. We are also genuinely concerned about the Northern Cheyenne's desire to remove any clouds on the title to their lands. As evidence of our continuing interest, we have for more than a year participated in preliminary discussions with the Tribe, other companies and the Department of Interior in an effort to find a mutually agreeable and fair solution to the situation.

AMAX Coal's leases in the Cheyenne area represent the greatest contiguous tonnage reserve now controlled by our Company. These leases and permits were negotiated by the federal government on behalf of the Tribe and were agreed to by the authorized Tribal representatives. We and other lease and permit holders relied in good faith on the premise that the federal government acted as trustee for the Tribe and would uphold our rights as conveyed. To date all parties have avoided litigation of this issue—this avenue would be extremely costly and time-consuming to all concerned.

Mr. Chairman, AMAX Coal Company has been involved with the Northern Cheyenne Tribe, the coal reserves in question and the federal government since before 1969. We believe that all of our efforts concerning these coal reserves over the last 11 years have been above-board and in good faith.

In 1971 AMAX purchased preferential right prospecting permits for some 72,000 acres within the Northern Cheyenne Indian Reservation. Although there were questions about the marketability of the coal in the Montana area, and the value for coal on most federal lands was minimal, AMAX decided to proceed in hopes of developing this property.

Since that time, it has been determined that the value of the coal in the area in question is some of the highest in the region. It is our understanding that significant mining operations are planned near the Reservation, including railroad transportation, which makes the properties which we are discussing even more attractive.

Since the time when agreement was obtained from the Department of Interior (including the BLM and BIA) and the Northern Cheyenne (1969), the situation has changed to a great extent, and AMAX is now caught in a dispute between the Department of Interior and the Northern Cheyenne Indian Tribe; the result of which inhibits our further developing properties in which we invested almost a decade ago. AMAX has done nothing to exacerbate the situation. We have attempted to work out a solution with all parties.

AMAX Coal believes the introduction of S. 2126 now provides all parties with a vehicle to resolve the situation once and for all. However, the proposed legislation does not appear to provide for an equitable solution in its present form. We believe an amendment to S. 2126, which would permit the Secretary to pay damages for the extinguishment of the leases and permits in alternative coal rights or rights to bid in upcoming competitive lease sales, would provide for an equitable resolve.

In light of previous discussions with the Department of Interior, we are certain an agreement could be reached which would contain the following provisions:

In return for AMAX's willingness to release all claims to property on the Cheyenne Reservation and to refrain from any litigation against the government in regard to this matter, that the Secretary of Interior and the companies will enter into an agreement which will result in the non-competitive lease of federal coal to AMAX. (We want to emphasize that we do not seek an outright exchange or a lease which corresponds in tonnage to our estimated reserve on the Reservation.)

In the event that the Secretary and AMAX are unable to agree upon a specific area of interest, AMAX and the other parties with interest on the Reservation will be awarded bidding rights in an amount to be determined by the Secretary for use in subsequent federal coal lease sales.

The Department and AMAX have agreed, in principle, to a proposed lease area which is contiguous to an on-going operation in the State of Wyoming which will be developed in accordance with the appropriate regulations of the Department of Interior. The Secretary has insisted and the companies have agreed that

any lease area agreed to will not in and of itself create a new mining operation. The area selected by AMAX will provide the most economic and environmentally sound development of the reserve in the shortest time frames. In fact, there is good reason to believe that this coal cannot and will not be developed by a party other than AMAX.

The development of the proposed lease area will be totally consistent with and issued under the provisions of the Federal Coal Management Program in regard to land use planning, environmental considerations and subject to all other permitting and operational requirements imposed by BLM, USGS, OSM, etc.

We believe the proposal outlined above is the most workable and reasonable solution to the overall problem. A successful implementation of this program will accommodate the wishes of the Tribe by providing them with unimpaired title to the reserves on the Reservation, compensate the companies in a manner which is acceptable to them, resolve any and all problems for the Department of Interior and particularly the Bureau of Indian Affairs, and be accomplished without the federal government being required to make substantial cash payments to the parties.

On behalf of AMAX Coal Company, I again thank you for taking an interest in this situation and providing us with a vehicle to remedy same.

Senator MELCHER. Now, Mr. Dahlstrom?

Mr. DAHLSTROM. Yes. I have a brief statement that I would like to read.

Senator MELCHER. Fine. Please proceed.

STATEMENT OF CLINT DAHLSTROM, VICE PRESIDENT AND GENERAL MANAGER, CHEVRON RESOURCES CO.

Mr. DAHLSTROM. Mr. Chairman, my name is Clint Dahlstrom. I am vice president and general manager of Chevron Resources Co.

Our company is charged with exploration for and production of nonhydrocarbon minerals for Standard Oil Co. of California, both domestically and overseas. That responsibility includes management of mineral properties owned by Chevron USA, Inc., which was formerly Chevron Oil Co., which presently holds mineral prospecting permit C–57–P–42 covering 27,750 acres on the Northern Cheyenne Indian Reservation. That permit was acquired in November 1971 from Bruce Ennis, who bought the permit in competitive bidding at Northern Cheyenne coal sale No. 3 on April 22, 1971.

Incidentally, S. 2126 as introduced indicates that Chevron USA also owns mineral prospecting permit C–57–P–46. This is not correct. I believe this latter permit may still be held by Bruce Ennis.

This prospecting permit was acquired by Chevron as part of its effort to enter the coal mining business. While Chevron is principally an oil and gas company, we believe our knowledge and expertise in that area can be transferred and applied to the production of other energy resources such as coal. The permit on the Northern Cheyenne Indian Reservation was attractive to us because large reserves of low sulfur coal on the permit area had been demonstrated by the drilling conducted by Mr. Ennis' principals, Norsworthy and Reger, Inc., in the summer of 1971.

It was our intention to continue evaluation of the property and proceed with early development of a surface mine. This intention has not materialized because of actions taken by the Northern Cheyenne Nation in their efforts to cancel all mining permits and leases on their lands. We have been unable to get permits to do further exploratory work. We applied both for extension of the prospecting permit and for

issuance of a mining lease. No action has been taken on either of these applications. We are still ready, willing, and able to proceed with further exploration and development of coal reserves within the permit area if we could obtain the concurrence of the Northern Cheyenne Nation.

However, Chevron does agree that some legislative solution to the present impasse is necessary. That solution should consider the legitimate interests of the Northern Cheyenne Nation in preserving their reservation lands and their way of life. However, it should also consider the interests of the operators who have invested capital and effort in the coal permits and leases.

The legislative solution we are discussing today, S. 2126, would cancel our permit as well as the permits and leases of others and would compensate us through claims filed with the Secretary of Interior. We cannot support enactment of S. 2126 as introduced. Cancellation of our mineral prospecting permit with an indefinite and possibly inadequate formula for compensation is unacceptable to us.

We believe that a better solution to this problem would be for the operators to negotiate with the Secretary of Interior for the noncompetitive acquisition of coal leases on Federal lands in settlement of their claims for compensation and to have such negotiated settlements included as a part of the legislation. We are willing to work with the Department of Interior and this committee or its staff to achieve these results.

That concludes my prepared statement. However, I would be happy to answer any questions which you may have about our position on S. 2126.

Senator MELCHER. Jim, did you want to make any comments?

STATEMENT OF JIM REGER, VICE PRESIDENT, NRG CO.

Mr. REGER. I'm Jim Reger, vice president of NRG Co., successor to Norsworthy & Reger, Inc., and at the present time we hold three permits on the Northern Cheyenne Reservation.

I don't have a prepared statement, but I might say that our company basically supports the position of Peabody, AMAX, Consolidated, Chevron, and all the other permit holders. We have always tried to cooperate with the Northern Cheyenne and their attorneys. We have always been willing, and have made several trips to Lame Deer and Washington, D.C. In fact, last week my partner called upon the Department back in Washington and gave them his assurance that we would cooperate in any way to resolve this impasse.

We know the Northern Cheyennes don't want us to mine coal down there. We found that out years ago, and we don't want a big fight or any more litigation than there has been. We are willing to walk away. After that problem, our company confined our coal operations to Wyoming where we knew what we were doing, and we have properties down there.

All we care about is some equitable type arrangement, some solution to this. The Indians need that so they can get on down the road with their plans. We are willing to do anything to cooperate with the Department on any legislation that is proposed.

Senator MELCHER. Does anyone else have anything?
Mr. WOOTEN. Mr. Chairman.
Senator MELCHER. Yes.

STATEMENT OF RON WOOTEN, CONSOLIDATION COAL CO.

Mr. WOOTEN. Ron Wooten, Consolidation Coal Co.

I also have a statement that I would like to submit for the record, but for the sake of brevity, I will just make a couple of remarks.

First, we endorse the testimony of Peabody and the other companies, especially concerning the vehicle for correcting the problem that we see existing. In our discussions with the companies and the Department, terms established by the Department, in addition, would require that payment would be made in coal rights adjacent to existing operations or operations for which a mine plan has been filed so that any additional payments would not be enough to establish an LMU in and of itself.

That's all I have.

Senator MELCHER. Thank you, Mr. Wooten. Your prepared statement will be made part of the record at this point.

[The prepared statement follows:]

PREPARED STATEMENT OF CONSOLIDATION COAL CO.

Consolidation Coal Company (Consol) appreciates the opportunity to submit a statement for the hearing record on S. 2126, a bill relating to certain leases involving the Secretary of the Interior and the Northern Cheyenne Indian Reservation. Consol endorses the testimony of Peabody Coal Company and supports the Amendment presented by Peabody.

Consol is the holder of one prospecting permit on the Northern Cheyenne Reservation. Such permit was acquired after good faith negotiations with the Department of the Interior acting as agent for the Tribe. This permit would be affected by enaction of S. 2126.

The problems associated with production of coal on the Northern Cheyenne Reservation have been known to Consol for some time. It should be pointed out that Consol understands the concerns of the Northern Cheyenne. Indeed, Consol and the other affected companies have been supportive of efforts to remove the existing title clouds, so as to provide clear title to the Tribe. To the extent that S. 2126 would do that, Consol acknowledges the effort, and is supportive of the concept. However, S. 2126 as introduced is not a fair proposal as far as Consol is concerned. Enactment of S. 2126 would undoubtedly place Consol and the other companies involved in a position where litigation with the Department of the Interior over damages would be the result. Consol does not wish to enter into such litigation but litigation is seen as the end result to enactment of S. 2126 as introduced.

All of the companies involved would prefer to eliminate the possibility of litigation by requesting the Committee's support for the Amendment offered by Peabody Coal Company. Specifically, the Amendment provides that damages could be made in kind, meaning other coal rights. In meetings with the Department of the Interior it was determined that methodology employed for payment must be such that the integrity of the Department's leasing program would not be jeopardized. Under the terms established by the Department, other coal rights could be offered in lieu of cash payments for damages. It should be pointed out that the Department's terms do not contemplate an acre for acre or ton for ton payment. Consol has submitted a proposal that would provide it with payment of approximately 20 percent of what has been ascertained by extensive exploration to be the current rights on the Northern Cheyenne Reservation.

Additionally, terms established by the Department would require that payment would be in coal rights adjacent to existing operations or operations for which a mine plan has been filed. The payments could not complete in and of themselves a "Logical Mining Unit" (LMU); however, these payments when

added to existing rights could, and in many instances will, establish an LMU. The terms also require that the payments be in coal rights, so situated, that it would be highly unlikely that anyone else would seek such rights. Consol's proposal to the Department concerns an area which it expects to lease in a 1984 lease sale. After all land use planning is completed, Consol probably could acquire the coal rights during calendar year 1983. Consol presently owns all the surface overlying the coal which it hopes to acquire.

Conoco Coal Development Corporation (CCDC), a sister company of Consol, is contemplating the establishment of a methane and methanol plant, utilizing the coal reserves, from the established LMU, made available from existing coal reserves and reserves made available by enactment of S. 2126 as amended, by Peabody. It is important that CCDC know as quickly as possible as to the availability of these reserves. CCDC will initiate a study as to the feasibility of such installation during calendar year 1980. Consol considers the coal and the area covered by its proposal to be the best available to CCDC from Consol reserves. Therefore, it is important that Consol know for certain that these reserves will be available. Enactment of S. 2126, as amended by Peabody would provide the needed impetus for CCDC to begin its feasibility study for establishment of such plant in Montana.

It is the position of Consol that it would support S. 2126 as amended pursuant to the Peabody proposal. Consol cannot, however, support S. 2126 as introduced.

Senator MELCHER. Jim, your recollection of the law is that the permits are not subject to acreage limitation but when they lead to leases, they are subject to acreage limitation?

Mr. HAUGHEY. Yes, at least at the time these permits were sold.

Senator MELCHER. Now, you mentioned the bill, as it is, might provide a constitutional problem. I think you said it would be a unilateral act of Congress, meaning that the Congress would cancel——

Mr. HAUGHEY. Right.

Senator MELCHER [continuing]. And then negotiate out your rights in dollars after that. You would view that as posing a constitutional problem?

Mr. HAUGHEY. Yes. I think at least the determination that the leases were canceled. I doubt that the Congress has the power to say that. A court would have, perhaps, if they are, in fact, invalid. A court could determine that, but I don't think that Congress has the power to do that if the parties who hold these property rights are unwilling to accept that cancellation.

Senator MELCHER. Does the constitutional part hinge on whether or not the Congress has the authority to declare the permits and leases invalid and not fulfilling the trust responsibility, or is it a question of cancellation without compensation?

Mr. HAUGHEY. Well, I think perhaps the Congress could provide for the condemnation of these rights, all right, and provide for compensation. That, I think, would be constitutional, but I am not certain that this takes really quite that form, and it doesn't—the objection from the companies' standpoint is that it does not provide any guidelines, any measure as to what damages are to be taken into account, and it does not really take the form of a condemnation statute. What the parties are now talking about is to eliminate the constitutional problem by agreements which the department and eventually Congress would determine would be fair and the Congress would be willing to accept in lieu of the leases and permits, the rights they have now. That would eliminate, I think, the constitutional problem entirely that I see exists in the present form of the bill.

Senator MELCHER. OK. Mr. Portmann, you talked about three permits contiguous that AMAX has. If the Secretary had not imposed a prohibition against any further action, AMAX would not necessarily have developed a mine anyway, at this point, would they?

Mr. PORTMANN. Secretary Morton? The moratorium at that point in time?

Senator MELCHER. Yes.

Mr. PORTMANN. That is a difficult question to answer. It depends on all the variables. Had that property—had all the parties involved been willing and anxious to develop the property, I think that we would have proceeded in a fashion that, if we were able to get the lease, that we would proceed with the necessary permitting, and that would have been through the time of the passage of the surface mining act, et cetera. If your question is would we have proceeded——

Senator MELCHER. If he had not imposed the 1974 moratorium, there is no assurance that AMAX would have mined 1 ton of coal or had one machine there ready to mine coal in the near future, is there? Isn't this all speculative?

Mr. PORTMANN. Oh, I do not think so. I do not think you can say there is no assurance of that possibility. We could have proceeded had—you know, if the economics were right, if all the parties agreed. It is a very good quality coal, very high Btu, et cetera. From an economic standpoint, I would say that we would have. It is possible that we would have proceeded. It is very difficult to say, Senator.

Senator MELCHER. It is really more likely you would still be sitting on those leases, would you not? If they had not gone to leases, if they had been permits, what would you have had, 3 years?

Mr. PORTMANN. We have tried, as a corporate policy, as company policy, not to sit on many of our permits unless we absolutely have to.

Senator MELCHER. Wait a minute. I think sitting on a permit is one thing, but you hadn't developed them into leases for 3 years.

Mr. PORTMANN. On our leases, we try to develop and mine, and not only to meet due diligence now, but just as a good corporate policy. We don't like to sit on the land.

Senator MELCHER. How many leases does AMAX have that have no mining equipment on them and nothing happening?

Mr. PORTMANN. I am unable to give you a figure, but I would imagine that the figure is very small compared to the leases that we do have that we are mining on.

Senator MELCHER. Wait a minute.

Mr. PORTMANN. If you are asking how many leases we have that no activity is——

Senator MELCHER. I don't know what you call "activity", but nothing being mined?

Mr. PORTMANN. I could submit a figure to you later, but I don't know. It is very few.

Senator MELCHER. Half a dozen?

Mr. PORTMANN. I doubt if it is that high at all.

Senator MELCHER. Now, the current market is soft; isn't that right? The coal market is real soft?

Mr. PORTMANN. In the industry, I believe it is right now, yes.

Senator MELCHER. Are you the one who testified about the proposal to build the railroad line and open a mine nearby?

Mr. PORTMANN. That is my understanding, that there is development in the area.

Senator MELCHER. On the other side of the Tongue River, off the reservation?

Mr. PORTMANN. Right.

Senator MELCHER. What I would like from all of you is to provide us—and I don't know how we can avoid this, but I don't know how we are supposed to operate here to devise something if we don't know what value is involved. I am requesting that you all provide the actual dollars spent on bids and royalties, actual dollars spent on drilling or exploration so that we have a figure. We have elicited from Mr. Harrison——

Mr. FERRAND. Mr. Chairman, I will make an attempt to answer that question.

Senator MELCHER. Very good.

Mr. FERRAND. Due to protests from our colleague companies, we have made an estimate that, including what Peabody has expended and what we are guessing the other companies have expended, total spent is not in the neighborhood of the $2.5 million indicated in other testimony, but it is probably closer to $20 million or more. We have certainly exceeded that amount ourselves—the amount that was indicated by Mr. Harrison.

Senator MELCHER. He identified $2.5 million royalty. Does that sound about right? Excuse me; bonus—$2.5 million bonus at the time of the bid. Does that seem about right?

Mr. FERRAND. I doubt if the bonus would exceed that amount.

Senator MELCHER. Then he identified that lease money had been paid, whatever the term is for it.

Mr. FERRAND. We paid rentals and advance royalties.

Senator MELCHER. Rentals and advance royalties?

Mr. FERRAND. Yes.

Senator MELCHER. And that is in an escrow fund and is accruing interest. Did he identify that as being worth about $2 million?

Mr. FERRAND. It is larger than that.

Senator MELCHER. Fine. Fine.

Mr. FERRAND. That, sir, is from Peabody alone.

Senator MELCHER. Peabody is the only one who has leases; is that right?

Mr. FERRAND. Correct.

Senator MELCHER. So that puts you in a different category?

Mr. FERRAND. Yes.

Senator MELCHER. What are the other expenditures for exploration?

Mr. FERRAND. For exploration—drilling and feasibility studies. Peabody also expended a considerable amount of money in furtherance of a contract to develop a gasification plant there, and we had signed a contract for delivery of coal. We did additional exploration based on that contract and exploratory engineering studies, all of which became inactive upon the Secretary's 1974 decision.

Senator MELCHER. Well, we have that identified in a different category. Feasibility studies, contracts for coal gasification, contracts for machinery, contracts to mine coal, contracts to sell coal are, in my view, in the realm of speculation.

Mr. FERRAND. With your permission, I would characterize them as evidence of diligence of our actual and factual intent to develop the coal that we received in the lease.

Senator MELCHER. Yes, but you can be diligent at the same time that it is speculation. There aren't any coal gasification plants anywhere in the West that I am aware of.

Mr. FERRAND. No. There is one under construction, as you are probably aware, but at that time——

Senator MELCHER. Which one is that?

Mr. FERRAND. That is the Great Plains project in North Dakota.

Senator MELCHER. Is it under construction?

Mr. FERRAND. It has been approved by the Federal Energy Regulatory Commission and is scheduled to begin construction, I think, on April 1.

Senator MELCHER. Well, that will be the first.

Mr. FERRAND. That will be the first major gasification plant.

Senator MELCHER. And there are quite a few other coal gasification plants that have feasibility studies and from A to Z. I mean, feasibility studies on whether we get the money to build, and all sorts of things. I really think that it is difficult for us, as a committee, to attempt to establish that as firm on that type of investment because we are so aware that there has been so much of that investment that has not borne any fruit and probably won't bear any fruit because the market situation is not right or something else is not right, or an environmental impact statement can't be corrected and bonds can't be sold for the construction or the various regulatory agencies, whether they are State or Federal, won't clear the purchase and sale of—the purchase of the natural gas or the synthetic natural gas at that price and the sales to the customers involved under their jurisdiction. There is so much involved in that, that it is difficult for us to establish that as somebody's responsibility.

I want to add this point. There has to be a difference in what was done prior to 1974 and what was done after 1974.

Mr. FERRAND. Yes. Mr. Chairman, I would add that the existence of the coal supply agreement and the bona fide contract with enforcement clauses, et cetera, is a recognized expression of due diligence in the legal regime for leasing. Further, I would like to concede the point that establishment of the value for these properties is, in fact, very difficult. It is one of the problems which we would like to solve with the amendment we propose, and that is that there would be no evaluation either of the reserves, or no expression of what we are due in compensation in the way of dollars, either for what we have expended or for lost business opportunities. What, in fact, it would become is a negotiated settlement, not for our—the lawyers may correct me on that—not necessarily on our damages per se, but for our willingness to accept relinquishment of the leases and to forgo any litigated remedies. So there would be no attempt, in fact, to evaluate the coal prop-

erties that we would be granted in exchange for our agreement not to pursue those remedies.

Senator MELCHER. I follow that point.

Mr. FERRAND. It is a very simple remedy to avoid the valuation problem.

Senator MELCHER. It is a point well made, but let me repeat. We need to know investment dollars, both before 1974 and after 1974. Now, does this pose any problem to any of you?

Mr. FERRAND. Mr. Chairman, we could submit them to you, hopefully in camera so that they are maintained as confidential.

Senator MELCHER. Well, now, let me explain something. Jim will vouch for this. If we are going to present a bill, first to the committee and then to the Senate and then to the House, it is an obvious question how many dollars are involved, and no legislative body is going to vote on a settlement without asking how much value is involved. Not in the coal, but in actual expenditures.

Mr. FERRAND. I believe we can provide you that number.

Senator MELCHER. Is that posing any problem to any of you?

Mr. HAUGHEY. Mr. Chairman, you say before 1974. It seems to me we should present the whole investment that the companies have made and label when they were made so that if you think there is some distinction——

Senator MELCHER. Yes.

Mr. FERRAND. I would like to correct that impression, Mr. Chairman, because we are continuing to make payments. Our payments last year exceeded one-half a million dollars to the escrow fund.

Senator MELCHER. Yes, I understand that.

Mr. FERRAND. And we will exceed that figure this year.

Senator MELCHER. Yes, I understand that. You are required to do that or forgo your leases; is that correct?

Mr. FERRAND. That is correct.

Mr. HAUGHEY. Yes.

Senator MELCHER. I understand that perfectly, and that money is just waiting there. But these other expenditures, prior to 1974, will make a difference to the committee and perhaps to individual Members of Congress if we want to assess whose responsibility it was. After 1974, it is clear that there is a shift in responsibility. The Secretary, by his own issuing of his order of the moratorium, admitted some responsibility for an error.

Now, we don't know, and I am not trying to declare to what extent he was admitting error at that time, but it is obvious he was admitting error in 1974 to some degree, and we can each contemplate within ourselves how much error he was admitting. But he was admitting to some error when he issued the order for moratorium.

Mr. FERRAND. The action of the Secretary in 1974 did not directly cancel the leases. It gave us an opportunity to make a showing that, in fact, a waiver was warranted under the provision which the lease allegedly violated.

Mr. HAUGHEY. But only with the tribe, which was not willing to participate in that.

Mr. FERRAND. That is correct. So it had a de facto effect, but as far as we were concerned, we had a continuing opportunity, and we are, in fact, making payments in furtherance of that opportunity, although

we have recognized that, in effect, it is not possible to pursue development.

Senator MELCHER. Now, Mr. Dahlstrom, you suggested compensation by noncompetitive leases?

Mr. DAHLSTROM. Yes.

Senator MELCHER. That is not, as I understand it, what Mr. Haughey described.

Mr. DAHLSTROM. Well, there is some difference between the positions of the operating coal companies and ourselves. The operating coal companies are in the position to utilize contiguous acres to their existent operations. We have no existent operations. The object of acquiring this prospecting permit, as far as we were concerned, was to obtain lands on which a project could be established. So, as far as we are concerned, the loss of this prospecting permit is a loss of a major business opportunity.

Senator MELCHER. Does it violate any proprietary right of your company to tell us at this moment what Chevron paid for the assignment of the permit?

Mr. DAHLSTROM. Well, as yet, we have not made that figure public. I am quite willing to give you the figure in camera. I am not prepared to discuss it here.

Mr. FERRAND. Mr. Chairman?

Senator MELCHER. Yes?

Mr. FERRAND. So that there is no misunderstanding, the discussions that we have had with the Department, at least with respect to—I think I can speak for Peabody and AMAX and Consol—revolved around the possible issuance of leases, coal rights to Federal coal properties that really had very little or no economic value to the Government because they are in strategic locations that would make them uncompetitive. They are either adjunct to existing operations, meaning that no one else would conceivably bid on them except the companies involved here, or they are what I am sure you are familiar with, checkerboard areas where the odd-numbered sections are, in fact, owned by participating companies.

With respect to Chevron—and I am at some risk here speaking on behalf of Mr. Dahlstrom—but they have a unique problem. We would suggest, respectfully, that there are other remedies that they could pursue, either as individual noncompetitive leases, as he indicated, or in the acceptance of other mineral properties, which is permissible under the Mineral Leasing Act.

Senator MELCHER. Jim, I wonder if I could use the word "credits" to describe what you were proposing.

Mr. HAUGHEY. Credits? Was that the word?

Senator MELCHER. Yes.

Mr. HAUGHEY. Well, I think perhaps it is a pretty broad word, but I think it would encompass that concept, all right. Credits with respect to agreed-upon acreage which is adjunct to a lessee/permittee's existing-outside-the-reservation properties, or perhaps credits—perhaps one of them Mr. Dahlstrom may have in mind—credits for bidding rights at competitive sales, too, if, for instance, the lands for some reason are not suitable for mining or not available for leasing perhaps because, for instance, of the surface owner consent requirement in the Strip Mining Act. So that if the companies could not agree with

the Department upon adjunct properties that were desirable for the particular company, but not generally desirable for other competitive bidders, they could not find such a property suitable to the company and to the Department, then in the alternative, as I understand the discussions, there might be alternative bidding rights or credits, you might say, against——

Senator MELCHER. Bidding credits?

Mr. HAUGHEY. Competitive bidding, yes, in other sales. Is that correct?

Mr. FERRAND. Yes. The concept of bidding rights, Mr. Chairman, was in the event that any, or that part, or all of the chosen properties, if you will, given in settlement, were deemed unsuitable, the values for or whatever, then the alternative compensation—rather than having to go and reselect an area—the alternative compensation was bidding rights in accordance with a formula that would be spelled out in our individual agreements with the Secretary.

Senator MELCHER. Let me be candid with all of you. It would seem very difficult to me, and perhaps impossible, to pass legislation in Congress to solve this without an understanding of actual out-of-pocket money that is involved, even on coal that AMAX or Consol or Peabody might be wanting to acquire because it is adjacent to an ongoing mining operation. They are obviously going to be the companies who get that Federal coal. It is my understanding the procedure now is that the value is placed on that coal, even though there is no one else bidding on it, and that value is collective.

Recalling an incident just a few months ago, a Western entity acquired a quarter section of Federal coal, and there was a value placed on it, if I am not mistaken, of around $1.50 a ton. Is that correct?

Mr. FERRAND. I am not familiar with that.

Senator MELCHER. Is that the right procedure?

Mr. FERRAND. There is established on any sale, as a result of the passage of the Coal Leasing Limits Act of 1976, a minimum acceptable bid which is determined by, apparently, a formula which has not yet been fully devised by the Department of the Interior. So there is a minimum amount established on per tract—not per ton, per tract—what the Government would be willing to accept. That is not a number that is published in any case, and if we are competitive bidders, either singly or if there are several bidders, then we have to shoot at that unknown mark. We have to try to exceed it in order to get the lease. In some cases, the companies have not been able to exceed that mark, and the lease is not issued.

Senator MELCHER. It is my understanding that in this instance, Western was the only one who could conceivably mine it and that there were no other bidders.

Mr. FERRAND. If it is the case that I am familiar with, in fact, they refused to bid because the minimum acceptable bid amount exceeded what they thought was the value of the coal, and the coal did not issue. And the Department's option now is to consider reissuing the lease or reoffering the lease and trying to determine a different minimum acceptable bid.

Senator MELCHER. Now, is that the type of Federal coal that you were speaking of, that you described?

Mr. FERRAND. Yes.

Senator MELCHER. Both of you, Peabody and AMAX?

Mr. FERRAND. The Department indicated in its discussion with us that they were reluctant to give us new mining opportunities, but they would be willing to offer us coal which had minimal value to them because there was little opportunity for competitive bidding but might have intrinsic value to us as adjuncts to existing properties or operations.

Senator MELCHER. Is that what you are describing?

Mr. PORTMANN. That is our understanding.

Mr. WOOTEN. Yes, sir. Mr. Chairman, earlier I mentioned about the rounding out of an LMU, and while these payments cannot establish a logical mining unit in and of themselves, they can round them out.

Senator MELCHER. Jim, the procedure that you described is some sort of a procedure where it would be an established bidding credit for such. Is that true?

Mr. HAUGHEY. Yes, sir. That is true.

Senator MELCHER. That is not what Chevron could use; is that right?

Mr. DAHLSTROM. I am not quite sure that there is exact communication between the chairman and the other members of the panel or myself, because it was my impression that there would be an exchange of lands without a determination of the relative values of the lands being exchanged.

Senator MELCHER. I don't think that is what you testified to.

Mr. FERRAND. It is a very fine point, Mr. Chairman. We want to avoid the concept of exchanges because that puts us in a different legal realm. Rather, this is not exchanges of land or coal rights but exchanges of coal rights for the companies' acceptance of a relinquishment—and for our willingness to sign agreements that we will not pursue litigation with respect to the Northern Cheyenne properties.

Senator MELCHER. I understand that part. But what I want to understand is who gets what. Jim, you were speaking of a certain value being attached to leases and you described that value as bidding credits; is that a good term?

Mr. HAUGHEY. Well, I hesitate to try to clarify the point because I have not been involved in the most recent discussions between the companies and the Department. My own understanding is that the value of the coal to the Government—at least of the off-reservation coal which might be leased to a particular company—would be established, I would say, by the Federal Government, and it would not exceed the value of these coal reserves that the company thinks it has on the reservation. In other words, we are not asking for $10 in place of $1. What it is more likely to be is a much lesser amount than the value of the reserves on the reservation, but Chris, perhaps you had better clarify that.

Mr. FERRAND. The point is that the bidding rights that we would get would be in accordance with a formula that did not relate to the Cheyenne properties at all. It would only relate to what we agreed upon might be a value, for part or all, on a percentage basis, or whatever, of the reserves that we would agree to accept as settlement.

Senator MELCHER. I don't know whether we are getting anywhere or not.

Mr. HAUGHEY. May I interject this one comment?

Senator MELCHER. What this bill seeks to do is keep you whole in terms of actual investment. The bill does not seek to set up the opportunity for similar coal somewhere else, and if you are talking about bidding rights, bidding credits based on actual dollar investment, we might have something to work out. If you are talking about bidding rights based on what the potential was of the leases or the permits, then I do not think we have anything to go on.

Mr. HAUGHEY. I might say that it is my understanding, at least, that the agreement between the company and the Department, as made, would finally be returned to Congress and your committee for consideration so that if it was conceived that it was an unfair exchange, an unfair amount of value going to the company, it could be vetoed.

Senator MELCHER. Yes. That is why I am trying to be very candid. Any proposal that reached us in the committee, whether it is in this Select Committee on Indian Affairs or whether it is the Senate Committee on Energy, that attempted to translate dollar investment on these permits and leases—which are not going anywhere—to be compensated by some opportunity for like amounts of coal, Federal coal somewhere else, I think, would be buried so deeply in the committee that you would never find it.

Mr. FERRAND. Mr. Chairman, the one misimpression we may have given, the things that we would ask for, the amount of coal which we would be willing to accept from the Secretary as settlement for our claims—at least I can speak from Peabody's standpoint—would not be an amount that anywhere near approaches what we are giving up in the way of leases, or would be willing to give up in the way of leases, on the reservation. It is a small fraction thereof. From the Secretary's standpoint, he is getting, in behalf of the tribe, a very valuable property and giving up a property which to him has very minimal value because he cannot issue it successfully in a competitive sale because there is only one possible bidder. That is a very important distinction.

Senator MELCHER. I understand that, but I think you have to put it in terms of dollars, and as long as even the noncompetitive leases are approached in terms of dollars, I think we can talk about that. When you said we are not talking about the value of the coal, I thought we were talking about the same thing because I do not think we can talk about the value of the coal.

Mr. FERRAND. It is really the value of, I guess, our willingness to clear title to the properties in question on the reservation and to drop the pursuit of litigation.

Senator MELCHER. Yes, I understand that point. Clint, did you have something you wanted to say?

Mr. DAHLSTROM. It is possible that Chevron would consider an arrangement, such as the coal companies are considering, on other minerals, other leasable minerals, so that conceivably we might be able to make some arrangement on oil shale or phosphate. We were investigating that possibility which would enable us to resolve our problems after the fashion that is proposed by Peabody, et al. Now, we have not yet concluded our investigations of that possibility, so I cannot say that there is such an opportunity for sure, but it is distinctly possible.

Senator MELCHER. I think there is another advantage for me being very candid with you in this matter. You could reach something entirely satisfactory with yourselves and with the Department of Interior and find that it is the most unsaleable item in Congress and you have gotten nowhere. The tribe has gotten nowhere and you have gotter nowhere. All you have gotten is some understanding of the Interior Department. I have to accept Mr. Harrison's testimony that he believes that legislation is necessary, and I would assure you that I think it is absolutely essential because I do not think any arrangement that the Department of Interior would make with you people would have a chance of flying unless it was legislated. I think Congress would step in almost immediately.

Mr. FERRAND. Mr. Chairman, there is one discussion that we might make, or at least from Peabody's standpoint. I cannot speak for the other companies, but one possibility is that each of us would proceed to negotiate a proposed settlement with the Secretary, and then the committee could consider whether it would affirm those agreements and authorize the provision of settlement.

Senator MELCHER. Yes. I think that is very practical, and I would encourage you to do that. But I hope you see where we are coming from and proceed along that line because I think I have some judgment on what will be acceptable in Congress and what we can present in a positive method to the committee, to the Senate—of course, this is repeated in the House—and defend it as a proper procedure to follow.

I can understand your point about not wanting legislation passed that says your leases are canceled and your permits are canceled, and then you negotiate out what you get out of that. I can understand your point very clearly on that. The purpose of the bill is to elicit from all parties involved, the tribe, you people, representing the coal companies, and the Department of the Interior, on the procedures that can be acceptable. And when we know what that procedure is, we can incorporate that in the bill.

I would like to do that this year. Time is getting very short. If we expect to pass a bill this year, we should have all of the data in hand in the next 3 or 4 weeks. No later than that. This is almost the end of March, and any bill that is not out of committee in a year like this when the Congress intends to adjourn prior to the election date, if you are not out of committee by the first of June, you better feel that you are in jeopardy in passing the bill this particular year.

Mr. FERRAND. So that I understand what you are requesting us to do, Mr. Chairman; we should go ahead and actually come to an agreement, proposed agreement, with the Secretary, and then submit it for your consideration; is that it?

Senator MELCHER. Correct. We will submit it in your behalf to the committee, and the Department also will. Please provide the committee—and we will, for the time being, hold anything you want held as confidential, in camera. Is that the legal term?

Mr. HAUGHEY. Yes.

Senator MELCHER. We will hold it confidential until you tell us what you want held confidential in terms of dollars spent, and we will respect that request.

Thank you all very much.

Mr. FERRAND. Thank you.

Mr. DAHLSTROM. Thank you.

Senator MELCHER. The last witness this morning is Allen Rowland, president of the Northern Cheyenne Council, and he is accompanied by Steven Chestnut.

Please proceed.

STATEMENT OF ALLEN ROWLAND, PRESIDENT, NORTHERN CHEYENNE TRIBAL COUNCIL, ACCOMPANIED BY STEVEN CHESTNUT, ATTORNEY AND DOUG RICHARDSON, COUNCIL OF ENERGY RESOURCE TRIBES

Mr. ROWLAND. Mr. Chairman, my name is Allen Rowland. The gentleman on my left here is Steven Chestnut, an attorney for the tribe, and the gentleman on my right is Doug Richardson, a former tribal employee who now works for the Council of Energy Resource Tribes.

I am Allen Rowland, president of the Northern Cheyenne Tribal Council. This statement is made on behalf of the Northern Cheyenne Tribe. We Northern Cheyennes are deeply appreciative of the courtesies and considerations extended to us by this committee and its staff in connection with the preparation and consideration of S. 2126. Furthermore, we feel deeply indebted to the chairman of the committee, Senator Melcher, for the courtesy, concern, effort, and support he has exhibited during the past 1½ years in connection with our endeavor to effect a just and final legislative resolution of the problem addressed by S. 2126.

The Northern Cheyenne Tribe urges the enactment of S. 2126. If enacted, this legislation would at last resolve an overwhelming problem which has threatened, haunted, and grieved our people since early 1973 when we first realized its enormity. Since that time in early 1973, we have steadfastly and strenuously sought termination of all claims under all coal permits and leases presently clouding our reservation. Enactment of this proposed legislation would bring this effort to a successful and, we believe, equitable conclusion.

From the outset, it has been our belief that the United States, and in particular the Bureau of Indian Affairs and the U.S. Geological Survey, bear primary responsibility for the unconscionable nature of these permits and leases. Accordingly, in the spring of 1973, we asked the Secretary of the Interior to conduct a fair and objective review of the performance of his Department in formulating and approving these coal transactions. We argued that such a review would disclose a shocking level of irregularity and incompetence on the part of the Department of the Interior, and that as trustee, the Secretary must lift the burden of that disgraceful performance from the shoulders of the tribe and the reservation. We buttressed this request for secretarial action by an extensive written petition to the Secretary, which, in meticulous and extensive detail, set forth the results of our factual investigation and legal analysis of the administrative record in these coal transactions. We have filed herewith a copy of that petition.

Our investigation and analysis revealed an overall record of illegality which affected every coal permit and lease issued on the Northern Cheyenne Reservation. The law violations were so serious, so basic,

and so numerous that no permit or lease enforceable against the tribe or the reservation could have been created. We confined our petition to matters which, we believed, required the Secretary to set aside the transactions as a matter of law. We contended that a secretarial examination of the Department's own records, and the applicable law, would compel the Secretary, as trustee of Indian resources and as Chief Executive Officer of the Department of the Interior, to act promptly to set aside the permits and leases. In this effort, we relied on the integrity of our Government to honor and respect its laws and on the integrity of the Secretary in the enforcement of those laws.

I will attempt now to summarize the events which have led us to that point.

In December 1965, the first serious expression of outside interest in the Northern Cheyenne coal reserve occurred. A consulting geologist submitted a proposal for the issuance of an exclusive prospecting permit which would include a right to negotiate a mining lease during the term of the permit. The Bureau of Indian Affairs recommended that it would be better to sell by public advertisement for bids. In early 1966, the tribe authorized the BIA to draft the necessary documents for such a public sale.

The BIA prepared a form of mining permit to be offered for bid by adapting an official form long in use under Department of the Interior regulations. The official form provided for an exclusive prospecting permit with an option to lease only a portion of the acreage covered by the permit. However, on Northern Cheyenne, this option language was expanded substantially and then maintained in that form throughout that initial public sale and the two subsequent Northern Cheyenne public coal sales which occurred in 1969 and 1971, respectively. This option provision has since been used by the successful bidders to lay claim to vast portions of the reservation land area.

The permit drafted for the first Northern Cheyenne coal sale contained no effective environmental or restoration provisions, and the attached lease contained only a solitary provision binding the lessee, and I quote, "to cooperate fully with the lessor and the Secretary", in reseeding stripmined areas.

A successful bidder would acquire a stripmining permit and an option to enter into a stripmining lease. The permit covered the exploration phase. Actual mining would be performed under the leases. Regrettably, the terms and conditions of the mining lease were established at the time of the offering of the permit when both the tribe and the BIA were essentially ignorant of the nature and value of the coal reserve covered by the lease. This format was followed in the second and third Northern Cheyenne coal sales as well.

The primary financial term of the lease—the royalty on production—was set in 1966 at 17½ cents per ton for coal delivered off the reservation, and 15 cents per ton for coal consumed on the reservation for the first 10 years of the lease, increasing to 20 cents and 17½ cents, respectively, during the second 10 years of the lease. These royalty rates remained unchanged through the second and third coal sales.

The first sale took place in July 1966 and offered approximately 94,000 acres of reservation land. Competitive bidding was limited to the bonus to be paid per acre for the privilege of prospecting and the

accompanying lease option. Only two bids were received, both from Sentry Royalty Co., a wholly owned subsidiary of Peabody Coal Co. Sentry made a bonus bid of 12 cents per acre, covering the entire 94,000 acres, for a total bid of $11,296.80. BIA officials quickly expressed their satisfaction, and the tribe granted a permit. Thus, the first foothold on the Northern Cheyenne coal reserve was established, and the BIA had set the pattern to be followed in the two subsequent coal sales.

By 1968, the tribe had received indications of further interest in its coal. This led to the offering for bid of yet another 128,316 acres in the summer of 1969. In that second coal sale, Peabody Coal Co. acquired three more tracts of reservation mineral lands containing 6,000 acres, 21,860 acres, and 27,530 acres.

Later, a third coal sale was scheduled for April 1971. Approximately 367,000 acres of reservation land were offered. Twelve bidders participated in the sale, including representatives of large coal and energy corporations, as well as individuals. Although Federal regulations and the conditions of the sale prohibited issuance of permits to anyone not a bona fide coal mining operator capable and qualified by experience and resources to conduct actual mining operations, no effort was made by the BIA to inquire into the qualifications of the bidders. As a result, substantial tracts were acquired by private individuals whose ability to develop the resource is highly doubtful.

The following permits were acquired: Bruce Ennis, 16,220 acres; Norsworthy and Reger, 14,000 acres; Nosworthy and Reger, 19,420 acres; Meadowlark Farms, or AMAX, 23,040 acres, 20,960 acres, 27,550 acres; and Bruce Ennis, 27,790 acres; and Consolidation Coal Co., 23,400 acres.

As indicated earlier, the first and second coal sales resulted in the acquisition by Peabody Coal Co., through its subsidiary Sentry Royalty Co., of permits covering 94,000, 6,000, 21,860, and 27,530 acres. However, the regulations at 25 CFR 171.9 set an acreage limitation of 2,560 acres on leases and on permits incorporating options to lease. Under the regulation, the acreage limitation may be exceeded only if two conditions are met: The larger acreage must be necessary for the establishment of thermal electric powerplants or other industrial facilities, and the excessive acreage must be in the interests of the tribe.

But, throughout the first, second, and third coal sales, the acreage limitation was disregarded. In fact, the entire reservation, subdivided into immense tracts, was offered during the course of the three coal sales. From their vast permit acreages, the permittees have since purported to exercise the right to obtain mining leases covering the following acreages: Peabody Coal Co., 41,680 acres; AMAX, Inc., 71,550 acres; Consolidation Coal Co., 15,300 acres; Chevron Oil Co., through assignment from Bruce Ennis, 27,390 acres; Northern States Power Co., through assignment from Norsworthy and Reger, 33,420 acres; and Norsworthy and Reger, 16,220 acres.

Meanwhile, in January 1969, a critical legal development had occurred. The Secretary of the Interior promulgated environmental protection regulations governing surface mining Indian lands. The regulations were the product of 2 years of study by the Department. They established a comprehensive scheme of controls designed to insure that any surface mining on an Indian reservation would take place only after Federal studies had established standards to be written into any

permit or lease protecting a broad array of ecological, social, and cultural values.

However, the BIA proved itself either unable or unwilling to implement the admirable intent of this regulation. No procedures were established by the BIA for the implementation of the regulations. And no steps were taken to establish staff, either in the BIA or in its technical support agency, the U.S. Geological Survey, capable or willing to perform the required technical examination. Therefore, although the regulation was in force, the second coal sale was formulated with, at best, token compliance. As a result, no provisions meaningfully protective of ecological, social, and cultural values were incorporated in the permit or attached leases.

Approximately 1 year later in mid-1970, Peabody Coal Co. sought to obtain the issuance of six leases arising from the 94,000-acre tract it had acquired in the first coal sale. Though clear that part 177 applied to Peabody's lease applications, the BIA failed, just as it had in the second coal sale, to implement the terms of part 177. The identical pattern was repeated in 1971 during the formulation of the third Northern Cheyenne coal sale.

In May 1973, long after the issuance of the permits arising from the second coal sale and the six Peabody leases and the issuance of the permits arising from the third coal sale, the BIA issued two documents entitled, respectively, "Technical Assessment, Coal Leases, Northern Cheyenne Reservation," and "Technical Assessment, Coal Permits, Northern Cheyenne Reservation." The documents expressly admit that they are after-the-fact technical examinations. The permit technical examination was so callous as to recommend that the sale 2 and 3 permits "be issued" though in fact they had been issued several years before.

The lease technical examination reeled off a parade of potential consequences of strip mining including, "destruction of Cheyenne culture, the lifestyle of the people," "Cheyenne become a minority in their own homeland," "pollution of all sorts; that is, human, cultural, air, sound, noise, et cetera."

Prior to the time of the third coal sale, several other significant developments had occurred. On January 1, 1970, the National Environmental Policy Act of 1969 had become effective. The act required an environmental impact statement in connection with every recommendation on major Federal actions significantly affecting the quality of the human environment.

In February 1971, the U.S. Geological Survey recommended changing the royalty basis for coal leases on Federal lands from a fixed tonnage royalty to a percentage of gross sales. Specifically, it was recommended that 5 percent of gross sales be the standard provision for coal leases on Federal lands.

Notwithstanding these developments, the BIA went ahead with the third coal sale, oblivious to the requirements of the two new acts and using the same royalty formulas which were used in the 1966 and 1969 sales.

Finally, beginning in late 1972, the Northern Cheyenne tribal leadership began to comprehend the enormous threat these transactions posed to the reservation and its people. It soon became apparent that the involved BIA personnel, on whose advice and counsel the tribe

relied in entering into these transactions, had been inept, uninformed, and sadly overmatched.

In March 1973, the tribe enacted a resolution calling upon the Secretary of the Interior to withdraw his approval of all existing permits and leases. Shortly thereafter, we retained legal counsel to prepare the written petition to the Secretary of the Interior which I have already discussed. That petition detailed a staggering array of law violations by the BIA and, to a lesser extent, the USGS, incident to the first, second, and third Northern Cheyenne coal sales.

In response to the tribe's petition, Secretary of the Interior Rogers C. B. Morton issued a written statement on June 4, 1974.[1] In formulating his decision, the Secretary was subjected to intense lobbying on the part of the BIA area office and central office personnel responsible for the formulation and approval of the Northern Cheyenne coal leases who considered the tribe's attack to be a challenge to their personal reputation, professional standing, and job security. In addition, we understand that the Secretary's legal adviser, the Solicitor of the Department of the Interior, for reasons unrelated to the merit of the tribe's claims, advised against explicit secretarial findings of wrongdoing and illegality on the part of the Department. As a result, the decision of the Secretary contains no clear-cut findings of departmental wrongdoing. Indeed, the Secretary elected to refrain from addressing all but a few of the tribe's legal claims.

At the same time, the Secretary and the Solicitor were clearly impressed by the weight of the tribe's claims. In addition, and perhaps more importantly, it was apparent that the Secretary concluded that the state of affairs then existing on the Northern Cheyenne Reservation was intolerable. Clearly, he decided that in good conscience, he could not confirm the massive strip mining rights which had purportedly been granted to the coal companies. Moreover, he recognized that to do so would result in fierce criticism and public outrage.

Thus, a decision was crafted for the purpose of restoring the balance of power to the tribe. This was achieved by relying fundamentally on the Secretary's strongest suit, his statutorily based discretionary authority over Indian land transactions. No permits or leases were declared invalid. Instead, the Secretary in effect held that, on several different grounds, the coal companies had not yet obtained fully matured rights to mine.

A principal ground was the acreage limitation found in the applicable regulations which limits mining leases to 2,560 acres and provides for a waiver of this limitation on specifically stated grounds. Holding that no such waiver had occurred, the Secretary directed the coal companies and the tribe to either reduce all the leases and lease applications to 2,560 acres or jointly demonstrate that the acreage limitation should be waived. Through the imposition of this acreage limitation, the Secretary attempted to dramatically reduce the scope of the coal company claims.

In addition, the Secretary held that appropriate environmental impact statements would have to be prepared before he would consider approving any mining plans, permit renewals, or leases.

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[1] See p. 44.

Finally, he made the following statements of policy:

> As trustee, I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subordinate these interests to anyone's desires to develop the national resources on that reservation. Furthermore, the tribe and the coal companies may be assured that the terms and conditions upon which mineral development may proceed on the Northern Cheyenne Reservation will require their joint agreement and support prior to any further approval by me.

Since the issuance of the Morton decision, no environmental impact statements regarding coal development on our reservation have been performed. We maintain that so long as no lawful, tribally supported proposals for reservation coal development exist, the environmental impact studies are not in order.

In addition, the tribe has manifested to the coal companies their unwillingness to provide them with joint agreement and support of reservation coal development derived from the existing transactions.

This decision has now remained intact for almost 6 years. On the positive side, it has enabled the tribe to regain physical control of the reservation from the coal companies. On the other hand, the secretarial decision did not extinguish, and has failed to induce the coal companies to relinquish, any legal claims arising from the permits and leases. Thus, at this very moment, the tribe's title to more than 200,000 acres of reservation mineral lands remain encumbered by the cloud of these permits and leases.

Since Secretary Morton's 1974 decision, we have repeatedly asked his successors to provide justice to the tribe on this matter, but to no avail. As a result, we have considered the option of commencing litigation against the United States and the companies to clear title and for substantial monetary damages. However, after careful consideration, we have concluded that factors of cost and protracted delay and continuing uncertainty during the several levels of trial and appeal make litigation a matter of last recourse. For these reasons, we have more recently embarked upon yet another course to resolve this problem.

As the chairman of this committee well knows, over the past 2 years, the tribe has initiated a major effort to achieve a resolution of this leasing impasse through nonlitigation means. The approach developed by the tribe during this period has sought to achieve an equitable resolution to the conflict through reliance on a reasonable legislative solution. S. 2126 represents the current culmination of tribal efforts in this respect and it embodies the principle of the balanced, constructive approach we have sought to foster.

This approach, it should be noted, is also consistent with Federal energy policy and national energy needs. The current administration has frequently expressed the concern that Federal agencies cut down on court cases and eliminate long, drawn-out litigation by substituting negotiated solutions when possible. Secretary Andrus echoed this concern in a recent speech, February 1978, stating that energy and environmental conflicts too often have to be settled in court, causing slowdown in vital energy production.

Further endorsement by the administration for the type of approach taken by S. 2126 appears in President Carter's May 23, 1977, environmental message to Congress.

Furthermore, congressional concern for the proper use and disposition of the Northern Cheyenne mineral reserve is well established. On repeated occasions since 1926, Congress has, through legislation, demonstrated an explicit and continuing interest in the control and development of the mineral lands of the Northern Cheyenne. In 1926, in the Northern Cheyenne Allotment Act, Act of June 3, 1926, 44 Stat. 690, Congress determined to preserve tribal ownership and development control over all reservation minerals and, therefore, excluded them from allotment. In addition, Congress explicitly preserved a continuing authority to control and manage all tribal unallotted lands, including the mineral lands.

In 1961, Congress amended the Northern Cheyenne Allotment Act to specifically authorize development of tribal mineral lands in accordance with the provisions of the generally applicable Omnibus Tribal Minerals Leasing Act. In 1968, Congress further amended the Northern Cheyenne Allotment Act to extend in perpetuity the tribal ownership of all reservation minerals.

In 1976, the U.S. Supreme Court both recognized and approved this continuing congressional oversight of the mineral lands of the Northern Cheyenne in the *Northern Cheyenne* v. *Hollowbreast*. We believe that this record of congressional concern for, and interest in, the appropriate use and disposition of the Northern Cheyenne mineral estate fully supports and justifies a present exercise of Congress preserved oversight authority to correct administrative abuses and excesses that occurred during the Secretary of the Interior's stewardship over the Northern Cheyenne mineral lands in the years 1966 to 1971 when the coal permits and leases were formulated and approved.

It is our belief that S. 2126 embodies a fair and appropriate congressional resolution of this problem. If enacted, S. 2126 would have the immediate and, we believe, irrevocable effect of foreclosing the realization of any coal company claims or remedies against the reservation mineral lands. And we believe that an elimination of such claims remedies would not, as a matter of fact, change the actual position or leverage of that company. We think that each company would recognize that any rights to develop coal on the Northern Cheyenne Reservation are, in fact, meaningless unless enthusiastically supported by the Northern Cheyenne people as a whole. Absent such support, any such claims of right will not lead to development of the lands.

It is now absolutely clear that no such support exists for these transactions. During the initial stages of our struggle against these transactions, and, indeed, for several years thereafter, many governmental and industry people believed that the real purpose of the tribe's effort was to extract larger monetary payments from the coal companies through a forced renegotiation. However, for some time now, that cynical view has been discredited. It is now recognized that the tribe has acted pursuant to its own sense of duty and honor, the duty to protect and preserve the Northern Cheyenne Reservation as a homeland for the Northern Cheyenne people, and the traditional obligation to resist with all available resources the dishonoring attempts of outsiders to overcome the will of the Northern Cheyenne people.

S. 2126 makes no judgment regarding the economic value, nature, or extent of the rights of the coal companies under the permits and leases. The enactment of S. 2126 would neither enhance nor diminish the economic value of any such rights. If enacted, S. 2126 would have the directly beneficial effect of causing the Secretary of the Interior, for the first time, to forthrightly consider and determine the nature, extent, and value of any such rights. Without conceding their validity, it is our belief that if legitimate rights exist, they would be limited to no more than a right to reimburse out-of-pocket expenditures made in reliance on the governmental approvals of these transactions. In fact, even such claims may be subject to substantial offset by the value received by the companies through their extensive use and enjoyment of the exploration privileges provided for in the involved documents. In any event, the enactment of S. 2126 would precipitate a full and careful secretarial evaluation of these and any other legal considerations or defenses applicable to the legal position of the companies. Certainly, it is appropriate that the Secretary of the Interior finally confront and recognize his responsibilities to do justice in this matter.

In summary, we believe that the approach taken by S. 2126 represents an equitable resolution to the disputed coal lease situation on the Northern Cheyenne Reservation. Therefore, the Northern Cheyenne Tribe strongly endorses S. 2126. We support this bill as it is currently written and would support any modification of this bill which meets the approval of the Senate select committee and which would accomplish the same ends. We urge Congress to recognize our need and to act upon it.

Mr. Chairman, thank you for your courtesy, attention, and consideration in this matter.

Senator MELCHER. Thank you, Allen. I think you have provided the committee with the most thorough and comprehensive documentation of this whole sad affair that has been provided many times from past to present.

We also appreciate the summary and points of law that are attached to your statement and which will be made a part of the record immediately following your statement. It is very helpful to the committee to have the points involved affecting the validity of the permits and leases as is provided in that documentation.

You listened to our discussion with the Department of the Interior witness and with the representatives of the coal companies this morning, and I think you are aware of exactly where we are. I think we seem to have general agreement all the way around that settlement will probably depend upon legislation. While the Department and the companies do not like S. 2126 as it is drafted, it clearly does provide the vehicle for a settlement which both of those entities could work with.

We will give a sufficient amount of time for the Department and the companies to make a proposal to the committee. Of course, we will provide you with their proposal, but I think it is obvious that unless we can establish some sort of a dollar value that is involved, and whether that is paid out in money or in the form of some sort of bid

credits on other Federal coal, we are going to have to be able to make a convincing case to Congress that such a procedure is warranted.

If we are not talking about the total value of the coal that is involved in the permits and leases involved on the Northern Cheyenne Reservation but are talking about actual dollars expended and want to make some type of an arrangement for bid credits on that basis, I think we have something that Congress can accept.

There is the point that has been made by the representatives of the coal companies that there needs to be some consideration, they believe, beyond that, that goes to the point of their removing their interest in the leases and permits from contention. Therefore, settlement would not require litigation, which we can all agree would be very extensive and time consuming.

I think it is obvious that my position is that simple trade of coal, Federal coal, off the reservation for that coal involved on the reservation, involving the Northern Cheyenne Tribe, would not be a procedure that Congress would look favorably on. I think they would reject it out of hand. However, I think Congress would look favorably on some sort of procedure that has what has been described by the coal companies as bid credits for other Federal coal. I think there is a possibility of that, and we will relate the determination and the method they would like to use that is agreeable to the coal companies and to the Department.

Hopefully, we will have that before 30 days has expired, because if we are going to pass this bill this year, we have to keep in mind that we have to have prompt action in, first of all, consideration to the Senate, and perhaps a companion bill introduced in the House. I don't know, but either way, we have to clear both bodies, and we have to do that this summer if we are going to do it in this Congress.

I want to thank you all very much for a very fine presentation.

Mr. CHESTNUT. Thank you. We also want to file this petition, a copy of which was filed with the Secretary, which is just a complete record of everything that happened from the beginning. We would like to make this a part of the record.

Senator MELCHER. We will make that part of the file.

Mr. RICHTMAN. We already have a copy of that on file.

Mr. CHESTNUT. You already have a copy. Then I will take this back to Seattle with me.

Senator MELCHER. The committee already has that on file, and we will make it a part of the file in conjunction with this bill.

[The material submitted by Mr. Rowland follows:]

SUMMARY OF POINTS OF LAW AFFECTING THE VALIDITY OF COAL PERMITS AND LEASES ON THE NORTHERN CHEYENNE RESERVATION

(A Memorandum to the Solicitor, Department of Interior, Submitted on Behalf of the Northern Cheyenne Tribe by Zlontz, Pirtle, Morisset & Ernstoff, their Attorneys)

I. BACKGROUND

This memorandum is submitted pursuant to the agreement of July 31, 1973, between counsel for the Northern Cheyenne Tribe, Alvin J. Zlontz, and representatives of the Solicitor, United States Department of Interior, concerning procedures to be followed with respect to the conflict over the coal leases and permits on the Northern Cheyenne Reservation.

On March 5, 1973, the Northern Cheyenne Tribe passed Resolution No. 132 (73) directing that all existing permits and leases for coal exploration and mining on the Reservation be cancelled by the Secretary. In March 1973, the Tribe submitted a petition to the Secretary demanding that the Secretary declare the leases and permits void. On June 6, 1973, Alvin J. Ziontz, of the firm of Ziontz, Pirtle, Morisset & Ernstoff, wrote to the Secretary and requested that no final action be taken on the Tribe's petition until the firm had had an opportunity to complete its factual and legal investigation of the matter. On July 31, 1973, Alvin J. Ziontz met with Kent Frizzell, Charles Soller, William Moses and David Lundgren to discuss the procedural framework for reaching a decision on the Tribe's petition. It was agreed that counsel for the Northern Cheyenne Tribe would prepare a memorandum to the Solicitor summarizing the points of law which they regarded as affecting the validity of the permits and leases; that the memorandum would not attempt to set forth in full the legal grounds and authorities, but would be in summary form only; that the memorandum would indicate with respect to each point of law whether counsel viewed it as rendering the permit or lease void ab initio, or voidable; and finally, indicating which permits and leases were affected by each legal infirmity. This memorandum is submitted pursuant to that agreement.

This memorandum is not intended to constitute a final summary of the Tribe's position. The right is reserved to bring to the attention of the Secretary any additional grounds which may be discovered in the course of further investigation or analysis.

The points of law are listed, briefly described, and specified as to legal effect in part II. Their applicability to the particular leases and permits is set out in tabular form in part IV.

II. POINTS OF LAW AFFECTING THE VALIDITY OF THE LEASES AND PERMITS

A. Pre-issuance grounds: Violations which rendered the permit or lease void ab initio.

1. *Failure to perform technical examination.*—The cornerstone of 25 CFR part 177 is the technical examination. § 177.4(a). No technical examination was made, and, therefore the mandate of part 177 was ignored. The required preissuance careful consideration of the broad panoply of tribal cultural, historic, social and environmental interests did not occur. The data required for the performance of every essential Departmental function under the regulation were never developed.

2. *Failure to formulate general requirements.*—The technical examination data provides the exclusive basis for the formulation of the general requirements required by § 177.4. Under part 177, the general requirements are the most vital provisions of a permit or lease. Yet none were formulated. As a result, the exploration plan and mining plan mechanisms were emasculated, since those mechanisms rely fundamentally on the existence of general requirements.

3. *Maladministration of part 177 violated NEPA.*—The National Environmental Policy Act of 1969 made it unlawful for the Federal Government to approve or engage in policies or programs of economic expansion or development of resources without first carefully considering and designing against environmental degradation. Section 102 of the Act directs that "to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies" of the Act. This mandate covered the Department of the Interior's administration of part 177, but was defied.

4. *Failure to perform pre-issuance studies required by NEPA.*—Section 102 of the National Environmental Policy Act of 1969 required the performance, prior to issuance of a permit or lease, of a documented assessment of environmental impact. No such impact studies were made.

5. *Violation of tribal charter provision limiting lease term to 5 years.*—The tribal charter (Section 5(b)(3)) limits coal leases to a term of 5 years. The instant leases, in violation of that limitation, provide for a term of 10 years and as long thereafter as coal is produced in paying quantities.

6. *Violation of tribal charter provision protecting natural resources.*—The tribal charter (Section 5(b)(4)) disallow action by or on behalf of the Tribe which in any way operates to destroy or injure the tribal grazing lands, timber or other natural resources on the Reservation. Leases providing for strip mining are, therefore, not permitted.

7. *Breach of trust invalidates Departmental and Tribal approvals.*—Aside from the enumerated statutory and regulatory violations, the trustee, in several ways, breached trust responsibilities. Among these defaults were the following: (1) The trustee failed to advise the Tribe that the proposed strip mining would have devastating effects on its most vital interests, that the proposed activities would wreak cultural, social, and ecological havoc; (2) the trustee failed to inform the Tribe about the nature and extent of the coal deposits; (3) no advice was given as to the great economic significance of coal with respect to the Nation's future energy needs; and, (4) the Tribe was advised to accept unconscionably low economic terms.

Under such circumstances, all tribal and Departmental approvals of permits and leases were defective and void. The breach of trust is seen clearly when the Department's administration, under NEPA and 43 CFR 23, of public lands is compared to its administration, under NEPA and 25 CFR 177, of Indian lands; there has been a more careful administration of the trustee's lands than the ward's lands.

8. *USGS defaulted its obligation to provide technical advice.*—Part 177 contemplates that the USGS will provide the required scientific and technical expertise in the performance of the technical examination, formulation of the general requirements, formulation and evaluation of exploration plans and mining plans, the setting of performance bonds, and the monitoring of activities under a permit or lease. Part 171 similarly relies on USGS to furnish all necessary scientific and technical information. These and related duties are more particularly described in 30 CFR 211 and 30 CFR 231. The USGS did not perform these duties, leaving the Tribe technically and scientifically uninformed. Any tribal approval of a permit or lease was therefore defective and void.

9. *Lease option not authorized by regulations.*—The regulation authorizing prospecting permits allows only the creation of a preference right to lease. § 171.27(a). There is no authority for the issuance of a permit which includes a right to compel a lease, yet every permit includes a provision purporting to grant such a right.

10. *Lease option effects an unlawful circumvention of Part 177.*—Section 177.4 requires the performance of a technical examination and formulation of general requirements both before issuance of a permit and before issuance of a lease. Assuming that a pre-permit technical examination had occurred, under part 177, it could have served only as a basis for the granting of permit rights. Yet all the permits purport to grant unqualified lease rights as well. This violates the formulation and intent of part 177.

11. *Permits cover excessive acreages.*—Section 171.27(a) requires all permits granting a preference right to a lease to comply with all laws and regulations applicable to leases. Therefore, the acreage limitation in § 171.9(b) applies to the permits. The permit acreages were far in excess of that limitation, without lawful basis.

12. *Acreage limitation was violated by provision of permit.*—Section 171.9(b) limits coal lease acreage to 2,560 acres. That limitation may be exceeded only if the interests of the Tribe will be served thereby; this precondition for exceeding the 2,560 limitation was unlawfully eliminated from paragraph 2(a) of the permit.

13. *Improper administration of the acreage limitation.*—In administering the acreage limitation, the Department, in violation of § 171.9(b), did not consider whether allowing excessive acreages would be in the Tribe's best interests, and considered only whether the coal companies deemed large acreages necessary to their purposes.

14. *Tract configuration improper.*—Section 171.8 and 171.9(b) set out restrictions as to the configurations of permit and lease tracts. These restrictions were violated.

15. *Inadequate permit bonds were posted.*—By virtue of § 171.27a, the bond schedule set out in § 171.6(a) applied to permits. The bonds posted fell far short of that standard. Under § 171.7, the permits should have been disapproved by the Department.

16. *Inadequate lease bonds were posted.*—The posted lease bonds were wholly inadequate in amount to protect the interests of the Tribe. Adequate bonds should have been required under the provisions of § 171.6(a) and § 171.6(c).

17. *Bond regulation violated by provisions of permit and lease.*—Under § 177.8, it is required that a bond in an amount sufficient to cover the costs of reclamation be posted prior to exploration or mining. The mandatory nature of this require-

ment was unlawfully changed in permit paragraph 2(r) and lease paragraph III(10).

18. *Superintendent failed to consult with the Tribe.*—Under § 177.12, a superintendent must consult with the Tribe in connection with the performance of the technical examination and formulation of the general requirements. This was not done. Therefore, any tribal and Departmental approvals were defective and void.

19. *Surrender regulation violated by lease provision.*—Section 171.27(b) sets out the mechanism for surrender of a lease. Surrender is formulated not as a right, but as a privilege subject to Secretarial approval. The lease, however, in paragraph III(24)(b) unlawfully converts surrender into a matter of right for the lessee. It also unlawfully deletes other conditions enumerated in § 171.27(b).

20. *Surrender mechanism renders lease illusory.*—Lease paragraph III(24)(b) purports to endow the lessee with a discretionary right to surrender the lease or any part thereof at any time at no penalty. This renders the lease illusory and void.

21. *The permits and leases are unconscionable.*—The financial provisions of the permits and leases are so grossly inadequate that they are unconscionable. The provisions purporting to grant the coal companies rights to strip mine massive portions of the Reservation's total area place in the hands of the coal companies the power to extinguish the Northern Cheyenne culture. That is unconscionable. A lack of positive preservation and reclamation provisions is unconscionable. The permits and leases are, therefore, void.

22. *Permits and leases held by unlawful trust.*—Federal law and policy (as contained, for example in 30 U.S.C. § 184(k)) provide that mineral permits and leases held by an unlawful trust shall be forfeited. The merger of Peabody Coal with Kennecott Copper Corporation was declared unlawful in *Kennecott Copper Corporation* v. *FTC*, 467 F. 2d 67 (10th Cir. 1972). Accordingly, all Peabody permits and leases are void.

23. *Permits acquired and held for speculative purposes.*—Permit paragraph 2(b) prohibits the acquisition of a permit for speculative purposes. Nevertheless, permits were acquired for such purposes.

B. Post-issuance grounds: Violations which render the permit or lease voidable.

24. *Exploration without an approved exploration plan.*—Section 177.6(a) requires the submission and approval of an exploration plan prior to any exploration activities. Nevertheless, exploration was engaged in without any such approved plan.

25. *Exploration without an adequate exploration plan.*—Part 177 requires that an exploration plan include detailed provisions describing the contemplated exploration, and the surface preservation, conservation and reclamation methods to be followed. See §§ 177.6, 177.8(a), 177.9(b), 177.10(a). No such plans were submitted.

26. *Exploration with a defectively approved exploration plan.*—§§ 177.6(b) and 177.6(c) provide for the evaluation and formulation of the exploration plan on the basis of the data from technical examination and the general requirement. Since a technical examination was not performed and general requirements were not formulated, there could be no valid approval of an exploration plan. Section 177.12 requires that the Tribe be consulted in connection with the approval of an exploration plan. No such consultation occurred, therefore, there could be no valid approval.

27. *Failure to perform required NEPA study prior to approval of exploration plan.*—Section 102 of the National Environmental Policy Act of 1969 required the performance, prior to the approval of an exploration plan, of a documented assessment of environmental impact. No such impact studies were made.

28. *Operations commenced before receiving written permission from U.S.G.S.*—§ 171.20(b) requires written permission from U.S.G.S. before commencement of operations. Operations commenced without receiving such permission.

29. *Exploration activities caused unlawful damage to land, improvements and stock.*—Permit paragraph 2(e) sets out the permittee's obligation to prevent unnecessary damage. This provision was violated.

30. *Operations reports not filed.*—§§ 177.9(a), 177.9(b), 177.9(d)(1), 30 C.F.R. 211.6(a), 30 C.F.R. 231.8 and permit paragraph 2(p) require the submission of detailed reports on operations under permit or lease. These reports were not submitted.

31. *Expenditure reports not filed.*—§ 171.14(b), Permit paragraph 2(b) and Lease paragraph III(6) require regular reporting of expenditures. These reports were either not filed or not timely filed.

32. *Required inspections not made.*—§§ 177.9(c)(2), 177.9(d)(2), 177.10(a), 30 C.F.R. 211.4, and 30 C.F.R. 231.3 require inspections of operations. These inspections were not performed.

33. *Exploration bonds were not posted.*—Under § 177.8, it is required that a bond in an amount sufficient to cover the cost of reclamation be posted prior to exploration. No such bond was posted.

34. *Insufficient development expenditures.*—Permit paragraph 2(b) specifies mandatory development expenditures. The required expenditures were not made.

35. *Illegal assignments.*—§§ 171.26(a), 171.26(b), permit paragraph 2(n) and lease paragraph III(9) prohibit assignment and creation of override agreements unless prior Secretarial approval is obtained. Assignments were made and override agreements entered into in violation of these provisions.

36. *Condition on assignments unsatisfied.*—The tribal approval of the assignments from Sentry Royalty to Peabody was expressly conditioned on Kennecott's guarantee of all permanent and lease obligations. The decision in *Kennecott* v. *FTC* would appear to render that condition unsatisfied. Peabody, therefore, can claim no rights arising from those assignments.

DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY, NEWS RELEASE—JUNE 4, 1974

MORTON ANNOUNCES DECISION ON NORTHERN CHEYENNE COAL LANDS

Secretary of the Interior Rogers C. B. Morton today announced an encompassing decision on the controversy involving leases and exploratory permits for coal development on the Northern Cheyenne Indian reservation in Montana.

The Northern Cheyenne Tribe petitioned the Secretary in January 1974 to withdraw the Department's approval of leases and exploratory permits for strip mining of coal on about 214,000 acres of the 433,740 acre reservation.

The decision announced by the Secretary today grants the petition in part; denies it in part; refers some questions to the Department's Office of Hearings and Appeals; and holds some decisions in abeyance.

As an alternative, the decision allows the Tribe to sue the coal companies involved with the support of the Secretary on any and all issues, or with the support of the Secretary to request the Justice Department to bring suit in the name of the Northern Cheyenne against the coal companies on the issues.

Secretary Morton said the decision was a necessarily complex resolution of the issues presented in the Tribe's petition.

"Although many of the allegations of invalidity were similar, each of the three coal sales and each of the leases and permits involved different circumstances and issues," he said.

"My decision, therefore, does not grant or deny the petition as a whole, nor can it be the final disposition of all the issues raised by the Tribe. Rather, I believe it establishes the essential framework for an eventual determination which will be equitable."

Various requests by companies holding coal exploratory permits on the reservation to go to lease on some of these permits and to renew some permits are also pending before the Department. The decision announced today also deals with these requests.

The text of the decision is attached.

TEXT OF DECISION ON NORTHERN CHEYENNE PETITION

I have before me a petition by the Northern Cheyenne Tribe to rescind this Department's approval of various leases and permits for coal mining on the Northern Cheyenne Reservation. Also pending before officials of the Department are various requests by the permittees to go to lease on certain of these permits and to renew certain other permits. This decision announces the Department's disposition of the Tribe's petition and the permittees' requests.

After careful research and consideration it has been determined that:

FIRST SALE

Bids were opened on July 13, 1966. On August 19, 1966, a two-year exploration permit was granted to the sole bidder, Peabody Coal Company for 96,829.95 acres. On August 13, 1968, a two-year extension was approved for that permit. On December 30, 1970, I approved six leases consisting of 16,035.05 acres, or 17 percent

of the total permitted acreage. The remaining acreage reverted to its original status prior to the exploration permit.

With respect to lease No. 14-20-2057-897 for 12,946.07 acres, there is no clear evidence that there was an explicit waiver of the limitation provided in 25 CFR § 171.9. Therefore, I direct Peabody Coal Company and the Northern Cheyenne Tribe to conform this lease to 2,560 acres or less, or clearly to demonstrate the need to waive this limitation.

As to this lease, as well as the other five leases, I have determined that the required approval of the Peabody Mining Plan is a significant Federal action which would substantially affect the environment; therefore, no further administrative action will be taken until the Department has completed an Environmental Impact Statement and I have made a determination that further action should be taken.

All other requests in the petition pertaining to the first sale are hereby denied.

My decision as to this first sale thus grants the Tribe's petition in part and denies it in part, and holds in abeyance all further approvals required by this Department.

SECOND SALE

On December 15, 1969, a two-year exploration permit was granted to the sole bidder, Peabody Coal Company, for 55,398.99 acres. On December 13, 1971, a two-year extension was approved, to become effective on December 15, 1971. On December 3, 1973, Peabody Coal Company requested to go to lease on 25,160 acres, approximately 45 percent of the permitted acreage. The remaining acreage reverted to its original status prior to the exploration permit. No administrative action will be taken until (1) Peabody Coal and the Tribe modify this request to conform to the acreage limitation of 25 CFR § 171.9, or clearly to demonstrate the need to waive this limitation; and (2) until an Environmental Impact Statement has been completed by the Department.

Since there is some question as to whether or not a technical examination has been done as provided in 25 CFR § 177.4, I am reserving my decision on this question and as an aid to any continuing investigation of this issue, I am asking the BIA Area Director in Billings to submit to me within 60 days a full written report summarizing his findings as to each of the separate matters required to be explored by the regulations.

All other requests in the petition pertaining to the second sale are hereby denied.

My decision as to the second sale thus grants the Tribe's petition in part, denies it in part, and holds one issue in abeyance for further decision. It denies Peabody's request to go to lease without prejudice to that request being modified by Peabody and the Tribe, but provides that final Department action on any such request will be held in abeyance until completion of an Environmental Impact Statement.

THIRD SALE

On May 21, 1971, four bidders were granted two-year exploration permits on eight tracts consisting of 172,291.89 acres. There was a total of 12 bidders. Leases have been requested on three tracts by one bidder, but as with the second sale leases requested by Peabody, no administrative action will be taken on this request until it is modified by the permittee and the Tribe to conform to the acreage limitation provided in 25 CFR § 171.9 or a clear demonstration of the need to waive this limitation is made. Permit renewals have been requested for an additional two years on the five remaining tracts. No action will be taken concerning the request to go to lease or renewals of the permits until an Environmental Impact Statement is completed.

It has been alleged that two of the successful bidders involving four tracts violated 25 U.S.C. 396a and 25 CFR § 171.2, § 171.3(a), § 171.5, § 171.7 and § 171.26 (bidding for speculative purposes by unqualified persons) and 25 CFR § 171.26 (unlawful assignment). I am herewith referring these two issues to the Office of Hearings and Appeals for findings of fact and conclusions of law, with instructions to determine these issues in an expeditious manner. The Solicitor's Office will participate in this hearing to represent the trust responsibilities of the Department. The Northern Cheyenne Tribe may, if it wishes, be a party to this proceeding.

Since there is also some question as to whether or not a technical examination has been done as provided in 25 CFR § 177.4 as to these permits, I am reserving

my decision on this question and—as with the second sale permits—I am asking the BIA Area Director in Billings to submit to me within 60 days a full written report summarizing his findings as to each of the separate matters required to be explored by the regulations.

The Tribe has also claimed that the permits and leases are invalid because there is no adequate bond provided as required by 25 CFR § 171.6 and § 171.8. While I do not believe that this deficiency merits cancelling my approval of these permits, I will ensure that prior to any further operations, the permittees and lessees shall post a bond that is fully adequate to cover the maximum anticipated costs of reclamation after exploration or mining.

All other requests in the petition pertaining to the third sale are hereby denied.

My decision as to this third sale thus grants the Tribe's petition in part, denies it in part, and holds portions of the petition for further decision. My decision denies the request of one permittee to go to lease without prejudice to that request being modified by the permittee and the Tribe, and provides that any further action by the Department, including permit renewals, will be held in abeyance until completion of an Environmental Impact Statement.

My decisions herein set out do not preclude the Northern Cheyenne Tribe from bringing their own lawsuit against the coal companies to test the validity of these permits and leases. Alternatively, the Tribe may request the Justice Department under 25 U.S.C. § 175 to bring a suit in the name of the Northern Cheyenne Tribe. I will support them in either request.

As trustee I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subvert these interests to anyone's desires to develop the natural resources on that Reservation.

The Tribe's petition presents extraordinary circumstances. Among other things, the Tribe has expended substantial sums of money in preparing and presenting the petition to me. The petition charges that officials of the Department have violated Departmental regulations in approving these permits and leases. Because of many of the unresolved allegations by the Tribe of Departmental laxity, I have decided that, to the fullest extent possible, outside sources will be used to prepare the Environmental Impact Statement or Statements. Furthermore, the Tribe and the coal companies may be assured that the terms and conditions upon which mineral development may proceed on the Northern Cheyenne Reservation will require their joint agreement and support prior to any further approval by me. Also, to the fullest extent permitted by my statutory authority, I will defray the expenses to be subsequently borne by the Tribe for attorney's fees and other costs in the administrative proceeding I have directed to take place and in any litigation it now wishes to commence against the companies.

Finally, to better fulfill my future trust responsibility to assure the protection of Indian culture and environmental interests as well as to allow maximum development of Indian natural resources, I have asked the Solicitor to rewrite (within 90 days) the present parts 171 and 177 of Title 25, CFR to correct their present ambiguities. I have directed the BIA to adhere strictly to the implementation of its regulations.

Senator MELCHER. The hearing is adjourned.

[Whereupon, at 12:45 p.m., the hearing was adjourned.]

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